Supreme Court of the United States

OCTOBER TERM, 1961

No. 794

UNITED STATES, APPELLANT

vs.

GEORGIA PUBLIC SERVICE COMMISSION

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

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[fol. 1] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

Civil Action No. 7528

UNITED STATES OF AMERICA, PLAINTIFF

vs.

THE GEORGIA PUBLIC SERVICE COMMISSION, DEFENDANT

COMPLAINT OF THE UNITED STATES OF AMERICA—filed March 9, 1961

Comes now the United States of America and for cause of action avers the following:

I.

This action is brought pursuant to the jurisdiction conferred upon this Court by Title 28, Sections 1345 and 1331, 2201, 2281 and 2284 of the United States Code for the purpose of having this Court declare that the provisions of Title 93, §§ 309, 310, 403 and 407, and Title 68, §§ 613 and 614 of the Georgia Statutes are unconstitutional and void as applied to shipments of property made by the United States between points in Georgia and for the further purpose of having The Georgia Public Service Commission permanently enjoined from regulating the rates for such shipments.

II.

The United States, in the discharge of its sovereign powers and responsibilities conferred upon it by the Constitution of the United States, has established throughout the United States and foreign countries a number of installations, both civil and military. Many of these installations were established primarily for the purpose

of providing for the common defense in the light of the worldwide commitments of the United States in recent years, and are interrelated and integrated into a general [fol. 2] nationwide and worldwide depot system designed to care for the logistical needs of the United States in the light of its broad strategic plans. There are approximately 25 *military* installations alone in the State of Georgia. There are also a number of civil establishments within the State including a large general supply depot maintained by the General Service Administration in Atlanta. In order to maintain these establishments and to carry out the purposes for which they were created, it is necessary to move large amounts of supplies and materiel into the State from other States. It is likewise necessary in many instances to transfer such supplies and materiel from one installation to another within the State.

In the year 1960 Georgia intrastate traffic in dry military cargo alone involved approximately 8,000 shipments weighing 60 million pounds. The cost of moving this Government-owned military property amounted to approximately $300,000. In addition to this dry cargo the cost of moving bulk petroleum between installations in the State for military purposes amounted to approximately $400,000 a year. The cost of moving supplies and material which are not strictly military was substantial. In addition to this property of the United States which moves between points in the State of Georgia, the United States contracts and pays for the transportation of household goods and personal effects of the Armed Services and other Government personnel between locations within the State. During 1960 there were approximately 11,000 shipments of household goods and personal effects of the personnel of the Armed Services alone, weighing approximately 4 million pounds, the transportation of which cost the United States approximately $175,000.

III.

Since the creation of the Federal Government and the establishment of the Armed Services, it has been the practice in the moving of supplies and property for the

United States by common carrier for duly authorized officers of the United States to negotiate rates for such shipments. This practice was found necessary due to the [fol. 3] unique character of the shipments by the Government and further due to the fact that the commodities involved are in many instances not of the type in the flow of commercial traffic. Thus, when the Interstate Commerce Act was enacted in 1887 providing for the publication of uniform tariffs by common carriers in interstate commerce for the general purpose of eliminating discriminations and undue prejudice to persons and localities, Section 22 of the Act expressly recognized the long-established practice and exempted shipments for the United States. It has been generally assumed that the powers and duties of the officers of the United States to make special arrangements for the transportation of such property applied alike to interstate and intrastate shipments, and since the earliest times such contracts have been indiscriminately made on the assumption that state regulatory statutes requiring the publication of tariffs or empowering the State Commission to prescribe rates between points intrastate, had no application to shipments for the United States. Thus the present Act of Congress from which the officers of the United States derive their power to negotiate rates for transporting such property for the United States makes no distinction with respect to interstate or intrastate shipments; *Federal Property and Administrative Services Act of 1949*, Public Law 152, 81st Congress, 1st Session, Sections 201 and 202, 63 Stat., at page 377, and the regulations of the various departments and agencies of the Government containing the instructions with respect to the negotiation of rates by the various officials of the United States make no distinction between shipments made intrastate and interstate.

IV.

Upon information and belief, for many years the Georgia Public Service Commission did not regulate the rates for shipments by the United States between points within the State. In recent years, over the protests of the officials of the United States, the Commission has asserted

[fol. 4] jurisdiction over such rates. Thus on July 27, 1960 the General Services Administration of the United States issued invitations for bids for the movement of household goods and personal effects of personnel of a communicable disease center being transferred from Savannah, Georgia to Atlanta, Georgia. In response to this invitation 13 duly certified carriers in Georgia submitted bids for the movement. The bids of 8 of these carriers were in accordance with the rates and charges prescribed by The Georgia Public Service Commission. Four of the carriers submitted bids at rates which did not conform to the schedules approved by the Commission, but were generally lower. In accordance with the rules and regulations governing the procurement of such services, the General Services Administration awarded the contract to the Consolidated Van and Storage Co., Inc. of Atlanta as the lowest responsible bidder. Consolidated Van and Storage Co., Inc. was one of the companies whose bids were at rates lower than those approved by the Commission. Whereupon the Commission advised Consolidated Van and Storage Co., Inc. that if it entered into the carriage upon the rates determined by the contract entered into with the General Services Administration, proceedings would be brought against it for the purpose of revoking its certificate. As a result of this threat on the part of the Commission, Consolidated Van and Storage Company, Inc. refused to perform the contract, and it was necessary for the General Services Administration, in order to carry out the movements on schedule, to engage another carrier at rates prescribed by the Commission. Notwithstanding the fact that Consolidated Van and Storage Co., Inc. had refused to go forward with the contract under the threat of the Commission, the Commission issued a rule nisi, dated September 26, 1960, directing the company to show cause why its certificate should not be revoked for failure to comply with the rates prescribed by the Commission in submitting its bid to the General Services Administration as [fol. 5] hereinbefore set forth. A hearing was held on the return of the rule nisi before the Commission in Atlanta on October 25, 1960. An attorney for the Gen-

eral Services Administration, as a representative of the United States, appeared at the hearing and petitioned the Commission on behalf of the United States to be allowed to intervene in the proceeding and present evidence and assert the position of the United States that the Commission did not have jurisdiction to regulate the rates for shipments by the United States between points in Georgia. The Commission refused to allow the United States to intervene in the proceeding.

V.

As a result of the actions of The Georgia Public Service Commission as set forth above the carriers in the State of Georgia will not submit competitive bids for the carriage of property for the United States or enter into any contract with the United States for the carriage of property except at rates prescribed by the Commission, and the Commission continues to regulate such rates from day to day.

VI.

The United States avers that insofar as the various sections of the Georgia Statutes cited above empower The Georgia Public Service Commission to prescribe the rates for shipments of property for the United States between points in Georgia, they are unconstitutional and void under Article VI, Section 2 of the Constitution of the United States in that:

1. For no valid reason within the police powers or other reserved powers of the State of Georgia, they place an unreasonable burden and impediment on the United States in the discharge of its constitutional powers and responsibilities under Article I, Section 8, Clauses 7, 12, 13, 16 and 17, and Article IV, Section 3 Clause 2, of the Constitution of the United States.

[fol. 6] 2. They place an unreasonable burden on interstate commerce in an area under the exclusive jurisdiction of the Congress of the United States pursuant to the provisions of Article I, Section 8, Clause 3, of the Constitution of the United States.

3. They contravene the policy of Congress implicit in the *Federal Property and Administrative Services Act of 1949*, Public Law 1952, 81st Congress, 1st Session, Sections 201 and 202, 63 Stat., at page 377, relating to the negotiation for the transporting of property for the United States and the regulations of the various departments and agencies of the United States issued pursuant thereto.

VII.

The United States avers that this controversy is real and of vital importance from its point of view within the intent of Title 28, Section 2201 of the United States Code, conferring upon this Court jurisdiction to determine and declare the rights, duties and responsibilities of all concerned; and in the event the Commission continues to regulate the rates for the shipments made by the United States, the United States will be subjected to unlawful regulation and will suffer irreparable injury therefrom and it has no adequate remedy at law.

WHEREFORE, the United States respectfully prays:

(a) That in accordance with Section 2284(1) of Title 28, United States Code, a three-judge court be convened to hear and determine this action.

(b) That in accordance with the procedure set forth in Title 28, Sections 2281 and 2284(3) of the United States Code, this Court grant an interlocutory injunction and all appropriate process necessary to prevent and prohibit The Georgia Public Service Commission from attempting to regulate the rates for the shipment of prop-
[fol. 7] erty for the United States between points in Georgia until this cause is finally heard and determined on the merits.

(c) Upon final hearing of this action that judgment be entered declaring that insofar as Title 93, Sections 309, 310, 403, 407; Title 68, Sections 613, 614 and related Sections of the Georgia Statutes prohibit carriers within the State from entering into contracts with the United States for shipment of property, including not only property owned by the United States but also the household effects of the personnel of the United States at rates other than those approved by The Georgia Public Service

Commission, they are unconstitutional and void; and that The Georgia Public Service Commission be permanently enjoined from taking any action or issuing any orders which would interfere with the United States and the various carriers in the State of Georgia from entering into special arrangements with respect to rates for the transportation of property for the United States; and for such other relief as the Court may deem just and proper.

s W. Wallace Kirkpatrick
Acting Assistant Attorney General

s Charles D. Read, Jr.
United States Attorney

s Raddia J. Rashid

s E. Riggs McConnell
Attorneys,
Department of Justice
Washington 25, D. C.

[fol. 8] ATTACHMENT TO COMPLAINT

AFFIDAVIT OF JAMES W. HIGGINS

With the United States Army)
At Arlington, Virginia) SS

James W. Higgins, Colonel, Department of the Army, Military Traffic Management Agency, deposes and states:

That he is and has been Director of Traffic of the Military Traffic Management Agency, Washington 25, D. C.

That his duties as Director of Traffic for the Military Traffic Management Agency are to supervise the elements of that Agency which are engaged in rate negotiation and analysis, routing and utilization of carriers, and the development of improved methods for the handling of

Department of Defense traffic. He has been an officer in the Transportation Corps, U. S. Army, since 1942, and among his assignments have been the following: Operations Officer, 2d Transportation Zone, New York; Chief, Freight Traffic Branch, Office Chief of Transportation; Transportation Officer, U. S. Army, Alaska; Port Transportation Officer, New York Port of Embarkation; Transportation Officer, 1st U. S. Army. That prior to entering military service, he had for fifteen years served in various capacities in the traffic department of a Class I railroad.

That the Military Traffic Management Agency carries out the responsibilities of the Secretary of the Army as the Single Manager for Traffic Management for the Department of Defense, and is responsible for directing all traffic management functions of all military departments within the Continental United States in connection with the procurement, use, cost and control of transportation services for the movement of military traffic by commercial transpotration.

[fol. 9] For many years the United States Government has negotiated special agreements with carriers as to the rates governing the transportation of Government property, intrastate and interstate, both Government-owned property and that for which the Government pays and bears the transportation cost, such as for the transportation of household goods and personal effects of Government personnel, including that moving within Georgia. Some of these agreements are nation-wide, or practically so, in scope, such as rail Joint Military Passenger Agreement No. 29; Traffic Executive Association, Eastern Railroads Quotation No. A1706-B, and Household Goods Carriers' Bureau Military Rate Tariff, I.C.C. No. 1A, on Household Goods between points within U. S. (other than Alaska and Hawaii), with the participating carriers having the right of taking independent action for establishing other and different rates.

That the U. S. Army and other military services have for years made shipments of Government traffic both of military hardware and of household goods of military personnel and their dependents, as well as other traffic necessary for the continued operation of the military

establishment, pursuant to rates and agreements negotiated with various kinds of carriers operating within that state, within other states, and throughout the United States. There are approximately twenty-five military installations in the state of Georgia, to, from, and between which such traffic necessary for the operation of the military establishment, is transported. Into and out of these military installations situated within the state of Georgia flow large amounts of supplies and materials. It is estimated that the current annual Georgia intrastate traffic of military supplies and materiel, alone, to and from the various installations in that state involve approximately 8,000 shipments weighing 60,000,000 pounds. The cost of moving this Government-owned property amounts [fol. 10] to approximately $300,000.00. These figures are exclusive of bulk petroleum, the cost of which is approximately $400,000.00 annually. At the present time there are also about 1,100 Georgia intrastate van carrier shipments a year of household goods of the Armed Services weighing approximately 4,000,000 pounds, which costs the United States approximately $175,000.00.

In the event the Georgia statutes and regulations affecting transportation rates and charges are construed as being applicable to traffic for the Federal Government, and if they are permitted to continue in effect as to such traffic, the time-honored right of the sovereign to negotiate rates on its traffic would be completely disrupted, with attendant confusion, possible delays, and apparent unnecessary increase in the expense to the Federal Government. It would materially hamper the Department of Defense in carrying out its responsibilities in national defense.

If the provisions of the Georgia statutes are interpreted as being applicable to Government traffic, and are permitted to remain in effect, they most certainly will disrupt the existing rate structure applicable on Government traffic, which was secured in part through negotiation, and would require the movement of all such traffic under tariff rates and provisions, many of which are unsuited for the unique requirements of military traffic. It is the policy of the Department of Defense to seek rate adjust-

ments for the movement of military traffic only when existing tariff rates are considered inequitable under the circumstances for the traffic involved. A large part of military traffic does move at tariff rates. Much of the traffic for the military services, however, moves to and from installations which are necessarily located outside the immediate boundaries of commercial zones and large industrial centers for which favorable rates have been established. In many instances, therefore, equitable tariff [fol. 11] are not applicable for the movement of Government traffic. Hence, obviously the cost of transporting property for the Government would be substantially increased, and military procurement procedures applicable within the United States would be compelled to conform to Georgia regulation. If this be permitted, it is conceivable that the defense establishment would likewise be required to comply with the regulation of the other 49 states and the District of Columbia. It follows also that were state-fixed rates to be considered unreasonable, military traffic would be subjected to such unreasonable rates until such time as required rate procedures were completed and an appropriate rate order entered. The time factor and flexibility in adjusting rates and related arrangements for military traffic is of the utmost importance to the affiant in his concern for efficient military traffic management because of the fact that tactical and strategic plans fluctuate rapidly and the supply system must be responsive to military operations. State regulation of rates on military traffic would, in his opinion, hamper the Military Traffic Management Agency in the timely performance of its traffic management mission.

That rate negotiations conducted by the Military Traffic Management Agency under affiant's directions meet the generally established criteria for reasonableness; and carriers who have indicated a willingness to negotiate reasonable rates on military traffic would be prevented from so doing should the Georgia statutes be found to be applicable to military traffic.

Accordingly, in order to prevent immediate and irreparable injury to the United States, it is submitted that an interlocutory injunction should be issued which would

prevent and prohibit the Georgia Public Service Com [fol. 12] mission from taking any action to enforce the said Georgia statutes insofar as they purport to be applicable to shipments of property by or for the United States, until such time as this cause is finally heard and determined on the merits.

Further affiant sayeth not.

/s/ James W. Higgins
JAMES W. HIGGINS
Colonel, USA

STATE OF VIRGINIA)
COUNTY OF ARLINGTON) ss:

Sworn and subscribed to before me this 30th day of January 1961.

/s/ Netha L. Healy
Notary Public, Arlington County
My Commission Expires May 28, 1962

(SEAL)

[fol. 13] ATTACHMENT TO COMPLAINT

AFFIDAVIT OF GEORGE D. KRUEGER

State of Georgia)
County of Fulton) ss

George D. Krueger, first being duly sworn, on his oath deposes and says that he is employed by the General Services Administration, as its Regional Director, Transportation and Public Utilities Service, Region IV, Atlanta, Georgia, and has been duly assigned or delegated certain duties in connection with procurement of transportation services for the mass movements of household goods and personal effects of government employees.

Pursuant to provisions of Title II—Property Management, Section 201 of the Federal Property and Administrative Services Act of 1949, (63 Stat. 383, 40 U.S.C. 481) Bureau of the Budget Circular No. A-37 of December 30, 1957 as amended by Transmittal Memorandum No. 4 dated February 20, 1960 and General Services Administration Order No. TPS 7460.1 dated March 15, 1960, the affiant was requested by the U. S. Department of Public Health, Communicable Disease Center of Atlanta, Georgia on July 15, 1960 to negotiate with carriers for the establishment of economical rates and charges to cover a mass movement of household goods and personal effects of Communicable Disease Center employees on transfer from Savannah to Atlanta, Georgia and vicinity in accordance with the above cited directives.

On July 27, 1960 affiant did issue and mail Standard Form 33, Invitation, Bid and Award No. 4-TPS-GS-61-1 to fifty-four (54) qualified carriers which invitation called [fol. 14] for a quoted rate per one hundred (100) pounds. In response to the invitation thirteen (13) carriers submitted sealed bids prior to the specified opening date. The thirteen carriers are listed on attached copy of Abstract of Bids, GSA Form 289. Eight carriers listed on lines 2 through 9 on the abstract quoted rates and charges as published in Georgia Public Service Commission Tariff No. 1-B, MF No. 3, effective July 1, 1959 and

supplements thereto. The other five carriers listed on lines 1, 10, 11, 12 and 13 submitted bids based on rates per one hundred (100) pounds which were lower than those published in the Commission's tariff.

Upon evaluating all thirteen bids received, affiant determined that bidder No. 12, Consolidated Van & Storage Companies, Inc., was the lowest responsive bidder and the award was made to Consolidated Van & Storage Companies, Inc. Whereupon, upon information and belief, several of the eight carriers who submitted bids at published tariff rates thereafter registered verbal complaints with the Georgia Public Service Commission respecting some carriers quoting prices lower than the Commission's maximum tariff rates. Upon information and belief, on August 12, 1960 the Commission telephoned the Consolidated Van & Storage Companies, Inc. and the four other carriers who bid lower than the rates published in the Georgia Tariff, and advised them that should they perform at the rates quoted GSA, they would be in violation of the Commission's rules and threatened them with revocation of their intrastate operating certificate.

The President of the Consolidated Van & Storage Companies, Inc. advised affiant that, as a result of the Georgia Commission's threat against the carriers, they would be unable to perform the services under the contract as awarded by this office August 5, 1960. A copy of Consolidated's letter dated August 23, 1960 is attached.

On August 24, 1960 this office acknowledged receipt of Consolidated's letter as per copy attached.

[fol. 15] Due to its inability successfully to negotiate a new contract with other carriers to perform the required services at lower tariff rates, the General Services Administration was forced to acquire the services of a carrier at rates prescribed by the Georgia Public Service Commission, which rates were higher than specified in the contract with Consolidated, based on individual moves.

Notwithstanding the fact that the contracting carrier refused to perform under its contract, the Georgia Public Service Commission issued a *Rule Nisi* dated 26 September, 1960, a copy of which is attached.

Affiant attended the hearing on the *Rule Nisi* proceeding, held at the offices of the Georgia Public Service Commission in Atlanta on October 25, 1960. General Services Administration was refused permission to intervene as a party in the proceeding, and affiant, as a representative of GSA, was refused permission to testify regarding the facts of this situation.

[fol. 16] Mr. George D. Krueger, Regional Director, Transportation and Public Utilities Service, General Services Administration, Region IV, Atlanta, Georgia, being duly sworn, states that he has read and is familiar with the foregoing Affidavit and knows the contents thereof; that the same is true to his own knowledge, except as to the matters therein stated on information and belief, if any, and that as to those matters and things he believes them to be true.

GEORGE D. KRUEGER

Subscribed and sworn to before me this 30th day of January, 1961.

/s/ Montene W. Hudson
MONTENE W. HUDSON, Notary Public
Georgia, State at Large

My Commission Expires July 6, 1961

(SEAL)

[fol. 17]

ATTACHMENT TO COMPLAINT

PAGE 1 OF PAGES

NUMBER OF INVITATIONS ISSUED: 54
NUMBER OF BIDS RECEIVED: 13

GENERAL SERVICES ADMINISTRATION
FEDERAL SUPPLY SERVICE

ABSTRACT OF BIDS

INVITATION NUMBER: 4TPUS-6A-61-1
OPENING DATE: 8-9-60 OPENING TIME: 2:00

DESCRIPTION OF SUPPLIES OR SERVICES: Movement of household goods from Savannah, Georgia to Atlanta, Georgia for account of the PHS-Communicable Disease Center.

LINE NO.	BIDDER	ACCEPTANCE TIME (Days) *	DISCOUNT (%) FOR PAYMENT IN 20 DAYS OR MORE	LETTER OR NOTATION QUALIFYING BID (Check, if Yes) †	DELIVERY SPECIFIED IN IFB (Days) ‡	ITEM NO.	QTY	UNIT	FOB DEL. POINT §								
						△		CWT									
1	Cherry Transfer & Storage Co., Atlanta, Ga.							$ 3.10	Plus Packing cost.								
2	Greyhound Storage, Inc., Atlanta, Ga.							4.40	4.40	3.50	3.50	3.50	3.10	Plus packing cost & Tariff			
								2000 #	2,500 #	4000 to 5000 #	6000 #	7000 #	8,000				
3	Givens, Savannah, Ga.							At Rates GPSC									
4	John J. Woodside Storage Co., Atlanta, Ga.							At Rates GPSC									
5	Arrow Van Lines, Savannah, Ga.							At Rates GPSC									
6	Youmans Van & Storage Co., Inc., Savannah, Ga							At Rates GPSC									
7	Washburn Storage Co., Atlanta, Ga.							At Rates GPSC									
8	Manfra Transfer & Storage Co., Atlanta, Ga.		2%-20 1%-30					At Rates GPSC	Packing @ $4.00 per cwt - Unpacking @ $1.00 per cwt						Based on Weight of Shipment		
9	Benton Bros. Drayage & Storage Co., Atlanta, Ga.							At Rates GPSC									
10	Suddath of Savannah, Inc., Savannah, Ga.		5%-20					4.25									
11	Atlanta Cartage Co., Atlanta, Ga.		2%-20					5.12									
12	Consolidated Van & Storage Companies, Atlanta Ga.							(3.98)	Includes packing.								
13	WEATHERS BROS STORAGE CO, ATLANTA GA							4.87									
14																	
15																	
16																	
17																	

I hereby certify that all bids received in response to this invitation were opened under my personal supervision, and that the names of all bidders have been entered hereon.

Lisa L Krueger (Signature)

TABULATED BY: Lisa L Krueger

DATE: Aug 9, 1960

* RECOMMENDATION AND APPROVAL OF AWARD(S) (Bidder(s) and Price(s) circled above)

BASIS FOR AWARD

X LOWEST RESPONSIVE BIDDER

TIE BID

ONLY BID

OTHER THAN LOWEST RESPONSIVE BIDDER (See explanation on reverse hereof or attached)

NUMBER OF AWARDS (Complete form): One

AWARD(S) RECOMMENDED BY (Initials and date): 5/15/60

AWARDS INDICATED ABOVE ARE AUTHORIZED

PURCHASING AGENT'S SIGNATURE AND DATE: Lisa L Krueger Reg Dir 4PUS

APPROVAL (Signature and title of approving officer, when appropriate)

FOOTNOTES

* Indicate by a check (√) a 60-day acceptance.
† When checked, enter 'CB', denoting 'See bid' immediately after related unit price.
‡ Indicate by check (√) if bid conforms to delivery specified, otherwise enter number of days offered in bid.
§ This line for optional use; indicate shipping point, lot price awarded, lot, etc.
△ This column for optional use; indicate number of employees (S = under 500 and O = 500 and over), surplus labor, disaster factor

SA FORM 289 (REV 1-58)

[fol. 18] ATTACHMENT TO COMPLAINT

GENERAL SERVICES ADMINISTRATION
(SEAL) Region 4

Atlanta 23, Georgia

August 24, 1960

In reply refer to: 4T

Mrs. Jo. T. Desmond,
President
Consolidated Van and Storage Co's.
231 Nelson Street, S.W.
Atlanta 3, Ga.

Invitation, Bid, and Award
No. 4-TPS-GS-61-1
Contract No. GS-04T-6
August 15, 1960

Dear Madam:

This letter acknowledges receipt of your letter dated August 23, 1960 wherein you advised this Administration that due to circumstances beyond your control, you would be unable to perform the services set forth in subject contract.

Therefore, this is to notify you that your right to proceed under subject Contract is hereby terminated. The services, provided for in your Contract, will be obtained from other sources and any additional costs to the Government will be charged to you.

Sincerely yours

GEO. D. KRUEGER
Regional Director, Transportation
and Public Utilities Service

[fol. 19] ATTACHMENT TO COMPLAINT

(SEAL)

GEORGIA PUBLIC SERVICE COMMISSION
244 Washington Street, S.W.
Atlanta 3, Georgia

File MCA 5626
Docket No. 1786-M

RULE NISI TO SHOW CAUSE

GEORGIA, FULTON COUNTY
GEORGIA PUBLIC SERVICE COMMISSION

vs.

CONSOLIDATED VAN & STORAGE COMPANIES, INC.,
231 Nelson Street, SW
Atlanta 3, Georgia

YOU ARE HEREBY REQUIRED to be and appear before the Georgia Public Service Commission, in its Hearing Room at 177 State Offices Building, 244 Washington St., S.W., Atlanta, Georgia, at ten o'clock A. M., on the 25th day of October, 1960, to show cause, if any you can, why the Commission should not cancel and revoke your Class "B" Certificate of Public Convenience and Necessity No. 1640 to operate as a motor carrier for the transportation of via the route and or routes described in said certificate, on account of your failure and refusal to comply with the Motor Carrier Acts of 1931, and the Rules and Regulations of the Commission, in the following particulars:

By submitting to the Regional Director, U. S. General Services Administration, Region IV, Atlanta, Georgia, an unauthorized tariff for the intrastate transpotration of household goods together with the rendering of services accessorial thereto between points within the State of Georgia, said tariff not having been filed with the Georgia Public Service Commission as required by Section 8 of the Motor Carrier Act of 1931, codified as Section 68-613, Georgia Code Annotated.

HEREIN FAIL NOT, UNDER PENALTY OF LAW, AS MADE AND PROVIDED.

BY ORDER OF THE GEORGIA PUBLIC SERVICE COMMISSION, this the 26th day of September, 1960.

/s/ Matt L. McWhorter
MATT L. McWHORTER, Chairman

/s/ A. O. Randall
A. O. RANDALL, Secretary

[fol. 20] ATTACHMENT TO COMPLAINT

CONSOLIDATED VAN & STORAGE CO'S.
Local and Long Distance Moving —
Storage — Packing — Shipping
Warehouse and Office: 231 Nelson Street, S.W.
Walnut 1412-3
Atlanta 3, Georgia

August 23, 1960

Mr. George Krueger
General Services Administration
Peachtree-Seventh Building
Atlanta, Georgia

Gentlemen:

Due to circumstances beyond our control we find that we are unable to perform the services under Invitation No. 4-TPS-GS-61-1, awarded to us, therefore it is necessary that we default on this contract. Thanking you for the consideration shown us, and hoping that we may be of service to you at some later date, we are

Cordially yours,

CONSOLIDATED VAN & STORAGE CO.,

By /s/ Jo. T. Desmond
President.

Filed March 9, 1961

[fol. 21]

ORDER DESIGNATING THREE JUDGE COURT—
March 28, 1961

The Honorable Frank A. Hooper, United States District Judge for the Northern District of Georgia, to whom an application for injunction and other relief has been presented in the above-styled and numbered cause, having notified me that the action is one required by act of Congress to be heard and determined by a district court of three judges, I, Elbert P. Tuttle, Chief Judge of the Fifth Circuit, hereby designate myself, Elbert P. Tuttle, Chief Judge of the United States Court of Appeals for the Fifth Circuit, and the Honorable Boyd Sloan, United States District Judge for the Northern District of Georgia, to serve with Judge Hooper as members of, and with him to constitute the said court to hear and determine the action.

WITNESS my hand this 27th day of March, 1961.

/s/ Elbert P. Tuttle
Chief Judge, United States Court
of Appeals for the Fifth Circuit

Filed March 28, 1961

[fol. 22] IN
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

[Title omitted]

DEFENDANT'S MOTION FOR MORE DEFINITE STATEMENT—
filed April 28, 1961

Plaintiff's complaint is vague and ambiguous to the extent that the defendant cannot reasonably be required to submit his answer on applicable motions in response thereto and defendant therefore moves that plaintiff be ordered to furnish a more definite statement of his claim as set forth in his complaint as follows:

I.

That the plaintiff make clear whether he alleges that the Georgia Public Service Commission asserts jurisdiction to regulate and regulates the rates charged by carriers for the carriage in intrastate commerce within the State of Georgia of *all* property for the United States or whether he alleges that the Georgia Public Service Commission asserts jurisdiction to regulate and regulates the rates charged by carriers for the transportation in intrastate commerce within the State of Georgia of *only* a certain *class* or *classes* of property for the United States, and, if he means the second alternative, then which class or classes.

The complaint is ambiguous in that it might be construed to charge the Public Service Commission with asserting jurisdiction over either *all* shipments or *certain* shipments of property for the United States. Plaintiff's complaint alleges in Paragraph 4:

"Upon information and belief, for many years the Georgia Public Service Commission did not regulate [fol. 23] the rates for shipments by the United States between points within the State. In recent years, over the protests of the officials of the United States,

the Commission has asserted jurisdiction over such rates." . .

Then the plaintiff sets out a specific set of facts involving such an alleged assertion of jurisdiction by the Georgia Public Service Commission. That specific incident, as stated by the plaintiff, involved a shipment in intrastate commerce of household goods owned by individuals who were employees of the Federal Government. The effect of the allegation of this particular factual incident is to strengthen the duplicitousness of the complaint as a whole.

It is true that in paragraph 7(e) the plaintiff prays for a declaratory judgment declaring certain Georgia Code Sections violative of the Federal Constitution insofa as they "prohibit carriers within the State from entering into contracts with the United States for shipment of property, including not only property owned by the United States but also the household effects of the personnel of the United States at rates other than those approved by the Georgia Public Service Commission . . ." This does not clarify, however, the ambiguity found in the plaintiff's statement of the factual situation constituting the controversy as contained in Paragraph 4.

In short, the defendant contends that the allegation as to "[the jurisdiction asserted by the Georgia Public Service Commission in] paragraph 4 is so ambiguous that it is unable to know with any degree of certainty exactly what the controversy between the United States and the Georgia Public Service Commission is alleged to be and thus it cannot plead properly to meet the contentions of the plaintiff."

II.

The defendant does *not* ask that the court order the plaintiff to furnish *evidentiary facts*. It merely requests the court to require the plaintiff to sharpen and make precise his allegation as contained in paragraph 4 in order that the defendant may know with reasonable cer- [fol. 24] tainty whether the plaintiff charges the defendant with asserting jurisdiction, pursuant to the Georgia

Code Sections cited by him to regulate rates charged by carriers for the intrastate transportation within the State of Georgia of *all* property for the Federal Government or whether he charges that the Public Service Commission asserts jurisdiction only over a certain class or classes of such shipments for the Federal Government. Thus the defendant will be notified with sufficient clearness of the controversy which allegedly exists between it and the plaintiff and which it must meet in its responsive pleading.

The defendant urges the Court that he believes that only by thus obtaining a *more definite* statement of the plaintiff's allegations may he move with reasonable certainty as to the extent of the controversy to respond to the plaintiff's complaint.

/s/ Eugene Cook
The Attorney General

/s/ Ariel V. Conlin
Assistant Attorney General

[fol. 25] IN THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

[Title omitted]

DEFENDANT'S MOTION TO DISMISS—filed April 28, 1961

The defendant moves the Court to dismiss the complaint in the exercise of its discretion on the ground that Sections 93-309, 310, 403, and 407 and Sections 68-613 and 68-614, Georgia Code Annotated, which the plaintiff prays this Court to declare unconstitutional insofar as they apply to carriers of property for the United States, do not in express terms apply to carriers transporting prop-

erty for the federal government nor has the Supreme Court of Georgia ever construed these Code Sections as to their applicability to carriers of property for the federal government.

Under these circumstances, the defendant contends that this Court should decline to take jurisdiction of the case to determine the constitutionality of the above mentioned Code Sections or to issue an injunction directed to the Georgia Public Service Commission prohibiting its enforcement of those Code Sections as to carriers transporting property for the federal government until the Georgia Supreme Court has construed the Code Sections in relation to the carriers of such property.

/s/ Eugene Cook
The Attorney General

/s/ Ariel V. Conlin
Assistant Attorney General

[fol. 26] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

[Title omitted]

PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION—filed May 4, 1961

The complaint in this action was filed on March 9, 1961, and in the prayer the plaintiff asks for a preliminary injunction on the grounds set forth in the affidavits of Colonel James W. Higgins, U. S. A., and Mr. George D. Krueger, of the General Services Administration, attached to the complaint. On April 27, 1961, the defendant,

Georgia Public Service Commission, filed a motion to dismiss the complaint, primarily on the ground that this is a proper case in which this Court should refer the parties to the state courts for the purpose of interpreting the state statutes involved. Comes now the plaintiff, the United States of America, and renews its prayer for a preliminary injunction set forth in the complaint and moves that the Court grant a preliminary injunction on the grounds set forth in the complaint and the affidavits attached thereto as heretofore set out. The plaintiff prays that this motion be heard at the same time that the defendant's motion to dismiss is heard.

/s/ Charles D. Read, Jr.
United States Attorney

/s/ E. Riggs McConnell
Attorney, Department of Justice
Washington 25, D. C.

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[fol. 27] IN
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

AFFIDAVIT OF GEORGE D. KRUEGER—filed May 5, 1961

State of Georgia)
County of Fulton) ss

Personally appeared before the undersigned, a notary public in and for the County of Fulton, in the State of Georgia, the affiant, George D. Krueger, personally known to the undersigned notary public and who, after having first been sworn to tell the truth did, on oath, state as follows:

That he is employed by the General Services Administration, as its Regional Director, Transportation and Public Utilities Service, Region IV, Atlanta, Georgia, and has been duly assigned or delegated certain duties in connection with procurement of transportation services for the mass movements of household goods and personal effects of government employees.

Further, that the transportation data, as set forth in the comparative statement attached hereto and made a part hereof, covering movements of household goods of government employees for account of the United States Public Health Service, Communicable Disease Center, reflects charges assessed and collected by carrier at published tariff rates as opposed to charges which would have been assessed and collected by the Consolidated Van and Storage Companies, Inc., had shipments moved at the quoted rate covered by Contract No. GS-04T-C, is true and correct to the best of his knowledge and belief. Further deponent saith not.

Geo. D. Krueger
GEORGE D. KRUEGER

Subscribed and sworn to before me this 3rd day of May, 1961.

Montegue W. Hudson
MONTEGUE W. HUDSON, Notary Public
Georgia, State at Large

My Commission Expires July 6, 1961
(SEAL)

COMPARATIVE STATEMENT OF COSTS UNDER PBULISHED TARIFF RATES VERSUS NEGOTIATED CONTRACT RATE OF MASS MOVEMENT OF HH GDS OF CDC EMPLOYEES FROM SAVANNAH, GA., TO ATLANTA, GA., METROPOLITAN AREA AUGUST, 1960, THROUGH JANUARY, 1961, INCLUSIVE

	Shipments Moved and Charges Assessed at Published Tariff Rates Ga. HH Gds Tariff 1B, GaPSC-MF #3					Consolidated Van and Storage Co.'s, Inc. (Negotiated Contract Rate) (Contract No. GS-04T-6)			Difference Between Published Tariff Costs and Contractor's Cost (Dollars)
Family Name	Weight (Lbs)	Rate (Cwt)	Freight Charges (Dollars)	Packing and Crating Charges (Dollars)	Total Charges (Dollars)	Rate (Cwt) (Actual Weight)	Freight Charges (Includes any Pkg & Crating) (Dollars)	Total Charges (Dollars)	
Robert F. Witter	7750 AS 8000	310	248.00	177.50	425.50	398	308.45	308.45	117.05
Cipriano Cueto, Jr.	4980	350	174.30	212.00	386.30	398	198.20	198.20	188.10
William L. Farrior	5940	350	207.90	260.25	468.15	398	236.41	236.41	231.74
Walter Mitchell	2450	440	107.80	66.75	174.55	398	97.51	97.51	77.04
Vincent A. Sodiak	4900	350	171.50	77.25	248.75	398	195.02	195.02	53.73
Thomas B. Gaines	6200	362	224.44	113.75	338.19	398	246.76	246.76	91.43
C. W. Smith	1750 AS 2000	440	88.00	132.75	220.75	398	69.65	69.65	151.10
*Richard L. Moore	4853	350	169.86	148.60	318.46	398	193.15	193.15	125.31
*Eddie Jones	4853	350	169.86	148.60	318.46	398	193.15	193.15	125.31
	43676		1561.66	1337.45	2899.11		1738.30	1738.30	1160.81

*Families have not moved yet and these are just estimated weights and charges.

Prepared March, 1961, by
GSA, TPUS, Region IV, Atlanta, Ga.

[fol. 29] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

[Title omitted]

PLAINTIFF'S REPLY TO THE DEFENDANT'S BRIEF ON ITS MOTION TO DISMISS—filed May 5, 1961

The complaint in this action was filed on March 9, 1961 and on March 28th, at the request of the defendant, an Order was entered extending the time for answering or otherwise pleading for thirty days after March 28th. On April 28th, in lieu of answering, the defendant filed a Motion For A More Definite Statement and a Motion To Dismiss. Upon receipt of these pleadings the plaintiff immediately on April 28th filed its main brief in the case, which had been previously prepared in the hope and expectation that the case would be submitted for final determination at an early date.

It appears that the defendant's Motion To Dismiss is based on the contention that the constitutional issue which is the sole issue raised by the complaint is not ripe for review by this Court because the Supreme Court of Georgia has not interpreted the sections of the statutes in question to be applicable to the United States—this though the Commission itself with the advice of the Attorney General of Georgia has interpreted the section as being applicable to the United States in one degree or [fol. 30] another for some time in the past. In Point IV of its main brief the United States deals with this aspect of the case and now relies on that portion of the brief in addressing itself to the defendant's Motion To Dismiss.

It will be noted that in all of the cases similar to the instant case, including those cited in the defendant's brief, there has been no intimation that this specially constituted District Court does not have jurisdiction to ultimately dispose of the constitutional issue raised by the complaint. On the contrary, it will be noted that the

mandates of the Supreme Court in these cases always expressly directed that the District Court retain jurisdiction pending any reference to state procedures for interpretative purposes. Further it must always be borne in mind that Congress provided for this specially constituted Court with its expedited procedures expressly for the purpose of passing on constitutional questions as quickly as possibly. Accordingly it seems implicit in the decisions that the reference to State Court procedures for purposes of interpretation must involve a problem of interpretation more complicated than the simple application of the maxim that the State statute is not to be interpreted so that a serious constitutional question is raised. It is respectfully submitted that a reference under such circumstances would simply be shifting the responsibility imposed on this Court by Congress to the State Courts thus defeating the whole purpose of the statutory scheme insofar as it contemplates expedition.

/s/ Charles D. Read, Jr.
United States Attorney

/s/ E. Riggs McConnell
Attorney,
Department of Justice,
Washington 25, D. C.

[fol. 31] IN
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

[Title omitted]

PLAINTIFF'S RESPONSE TO THE DEFENDANT'S MOTION FOR A MORE DEFINITE STATEMENT—filed May 5, 1961

Comes now plaintiff United States of America and in response to the Defendant's Motion For A More Definite Statement shows:

1. The United States denies that the complaint is vague and ambiguous in any respect as set forth in the motion made by the defendant.

2. It is submitted that the issue in this case is clearly set forth in Paragraph VII, Section (c) of the complaint in which the United States asks this Court to declare that the section of the Georgia Statutes which are the subject matter of the action are unconstitutional insofar as they "prohibit carriers within the State from entering into contracts with the United States for shipment of property, including not only property owned by the United States but also the household effects of the personnel of the United States at rates other than those approved by the Georgia Public Service Commission." Stated more precisely, the United States objects to the power of the State to stipulate the rates in contracts entered into by it to carry out its Constitutional responsibilities with the carrier in Georgia for the carriage of *any* property [fol. 32] when the contract is the contract of the United States and the United States assumes the responsibility of paying the carrier for the carriage by the terms of the contract.

/s/ Charles D. Read, Jr.
United States Attorney

/s/ E. Riggs McConnell
Attorney,
Department of Justice,
Washington 25, D. C.

[fol. 33] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

[Title omitted]

ORDER GRANTING MOTION FOR PRELIMINARY INJUNCTION—May 5, 1961

It appearing that the plaintiff, at the time of the filing of the within complaint, prayed for an interlocutory injunction, which said prayer has been renewed in a motion filed in connection with a hearing set this date for consideration of the motion to dismiss the complaint, and it appearing from the affidavit of James W. Higgins, Colonel, United States Army, and from the affidavit of George D. Krueger, that the United States is being daily prevented from contracting for the transportation of household goods of the United States Government personnel except in accordance with freight rates and schedules specified by the defendant, and it appearing from the exhibit attached to the affidavit of George D. Krueger that transportation charges thus caused to be paid by the United States Government are substantially higher than could be contracted for by the United States but for the action of the defendant, and that such loss to the United States Government cannot be recouped, and that thus the plaintiff will suffer irreparable injury if a temporary injunction is not issued,

Now, therefore, it is ORDERED that the defendant be and it is hereby temporarily enjoined from exercising or attempting to exercise any jurisdiction over transporta-[fol. 34] tion charges for the transpotration at the United States Government's request of property of United States Government personnel pending the further order of this Court.

It is further ORDERED that the parties may, within ten days from the date hereof, file affidavits in support of

and in opposition to the continuation of the period during which this injunction shall remain in force. The parties may file additional briefs touching on the continuation of the temporary injunction at the time of filing such affidavits.

This 5th day of May, 1961.

/s/ Elbert P. Tuttle
United States Circuit Judge

/s/ Frank A. Hooper
United States District Judge

/s/ Boyd Sloan
United States District Judge

[fol. 35] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

[Title omitted]

ORDER DENYING MOTION TO DISMISS--May 5, 1961

The motion to dismiss, heretofore filed by the defendant, is in effect a motion for this Court to abstain from determining the issues on the merits until the Georgia Supreme Court has construed the Code sections in relation to the carriers of the property over the transportation of which the defendant assumes jurisdiction.

It appearing that the plaintiff sought to intervene in one proceeding pending before the defendant touching on this question, and that its right to intervene was denied by the defendant, and it not appearing that there is any convenient or prompt or effective means by which the issue here presented can be passed upon by the courts of the state of Georgia, except by the filing of a suit in the Georgia courts by the United States, the motion is hereby DENIED.

This 5th day of May, 1961.

/s/ Elbert P. Tuttle
United States Circuit Judge

/s/ Frank A. Hooper
United States District Judge

/s/ Boyd Sloan
United States District Judge

[fol. 36] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

[Title omitted]

ORDER GRANTING MOTION FOR MORE DEFINITE STATEMENT—May 5, 1961

The defendant's motion coming on for a hearing and it appearing that the defendant's actions with reference to shipments of property belonging to the United States may differ from its actions with respect to household and personal effects of "personnel of the United States," and it appearing that the complaint does not expressly charge that the defendant is now asserting jurisdiction to regulate the charges charged by carriers for the transportation in intrastate commerce within the state of Georgia of property owned by the United States,

It is ORDERED that the within motion be and the same is hereby GRANTED to the extent that the plaintiff specify the type of transportation concerning which it charges the defendant is seeking to exercise jurisdiction.

This 5th day of May, 1961.

/s/ Elbert P. Tuttle
United States Circuit Judge

/s/ Frank A. Hooper
United States District Judge

/s/ Boyd Sloan
United States District Judge

[fol. 37] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

[Title omitted]

MOTION FOR SUMMARY JUDGMENT—filed May 17, 1961

Comes now the United States of America, plaintiff, and avers that from statements and representations made by officials and counsel for the defendant, Georgia Public Service Commission, in the public press and in open court, and particularly in view of the more definite statement of the issue involved filed by the plaintiff this date, it appears that there is no genuine issue of material fact existing between the plaintiff and the defendant in this action, and that the Court can finally decide the case as a matter of law.

Now, therefore, on the attached affidavits of Captain Harry B. Leiser, United States Navy, and Mr. Fred Denniston, of the General Services Administration of the United States Government, and on the pleadings and affidavits heretofore filed, the plaintiff moves this Court to enter a summary judgment in its favor pursuant to Rule 56(a) of the Rules of Civil Procedure.

/s/ Charles D. Read, Jr.
United States Attorney

/s/ E. Riggs McConnell
Attorney, Department of Justice
Washington 25, D. C.

[fol. 38] ATTACHMENT TO MOTION

AFFIDAVIT

STATE OF VIRGINIA)
COUNTY OF ARLINGTON) SS

Harry W. Leiser, Captain, Supply Corps, Department of the Navy, deposes and says:

1. That he is the Director of Freight Traffic of the Military Traffic Management Agency (MTMA), with offices in Washington, D. C., having assumed the duties of this office upon the retirement of Colonel James W. Higgins, USA, who executed an affidavit which was previously filed in this action in connection with the prayer of the United States for a temporary injunction.

2. That, as Director of Freight Traffic of MTMA, it is his duty to supervise rate negotiation and analysis, routing and utilization of carriers, and the development of improved methods for the shipment of freight by elements of the Department of Defense (DOD), including the shipment of the household goods and personal effects of Department of Defense Personnel.

3. That he is familiar with the proceedings already held in *U. S. v. Georgia Public Service Commission*, Civ. No. 7528, N. D. of Georgia, and is advised that the counsel for the Georgia Public Service Commission has stated that the Commission no longer asserts the right and power to regulate the rates for the shipment of property owned by the United States but continues to assert the right and power to regulate the rates for the shipment of the household goods and personal effects of personnel of the Government of the United States. Accordingly, in this affidavit he will deal exclusively with shipments of the latter type.

[fol. 39] 4. That since earliest times the movement of impedimenta of military personnel has been an integral part of military operation and movements. On large posts and installations in the United States today there is a separate office under the command of the Transportation Officer, charged with the duty of shipping the household effects of officers and certain enlisted personnel subject to change of station. Thus when orders are received

for a change of station the recipient merely turns over copies of his orders to the officer in charge of household goods and without any traffic management attention to his household goods by himself proceeds to his new station. The Transportation Officer makes all the arrangements with the carrier for the crating, packing, pickup, line haul, and delivery of the property. It is shipped on government bill of lading and thereafter audited as any other government account. The carrier is paid by a United States disbursing officer with a government check. Thus, the transportation of such household goods is for the United States just as much as any other government traffic.

5. That in so far as members of the uniformed services are concerned, Congress has expressly provided that upon the change of station personnel are entitled to transportation of their baggage and household effects at government expense, including incidental services such as packing, crating, drayage, and temporary storage. (See Career Compensation Act, 37 USC 253(c)). The *Joint Travel Regulations for the Uniformed Services, Chapt. 8*, which were issued for carrying out the Congressional purpose expressed in this state are comprehensive. The payment for this transportation service by the United States is considered an integral part of the member's compensation for serving his country. Similar provisions [fol. 40] are made for the shipment of the household effects of civilian personnel of the Department of Defense when the transportation is procured and arranged for by an agency of DOD.

6. Provision for the shipment of the household effects of the personnel of the Department of Defense and its components is a very important part of the defense program at the present time. Approximately $100 million a year is spent for this purpose. Modern warfare requires highly trained specialists and technicians and every effort is being made to retain qualified men in the service, particularly men with years of experience and training. These men naturally marry and have families and the proper movement of their household goods is an important morale factor.

7. The policy of the Department of Defense in carrying out this part of the defense program is set out in DOD Directive No. 4500.27, July 1, 1960. A copy of this directive is attached hereto. It will be noted that the main objective of the policy is to obtain "high quality service to military and civilian personnel of the Department of Defense in the transportation of their household goods at the lowest over-all cost to the government." Further, in accordance with the general policy of the United States in the procurement of services, it is the policy of this Agency to secure for the United States the benefits of free competition and to give to all citizens equal rights to compete for government business (See: 10 USC 2301 et seq.).

8. The statutes of the United States relating to the procurement of transportation and services incidental to the movement of the household effects of the personnel of the Department of Defense and the regulations issued pursuant thereto do not make any distinction between [fol. 41] shipments which are interstate and those which are intrastate in character, but on the contrary apply uniformly to all shipments regardless of the geographic location of the termini.

9. The affiant avers that if all fifty states were to regulate the rates for the shipment of the household effects of the personnel of the Defense Department it would be impossible to carry out or to comply with the national procurement statutes and implementing directives.

/s/ Harry W. Leiser
HARRY W. LEISER
Captain, SC, USN

STATE OF VIRGINIA)
COUNTY OF ARLINGTON) ss:

Sworn and subscribed to before me this 16th day of May 1961.

/s/ Netha L. Healy
(SEAL) Notary Public, Arlington County
My Commission Expires May 28, 1962

[fol. 42] ATTACHMENT TO AFFIDAVIT

July 1, 1960

NUMBER 4500.27

(SEAL) ASD (S&L)

DEPARTMENT OF DEFENSE DIRECTIVE

SUBJECT Transportation of Household Goods of Military and Civilian Personnel

References: (a) DOD Directive 5160.2, "Single Manager Assignment for Airlift Service."
(b) DOD Directive 5160.10, "Single Manager Service Assignment for Ocean Transportation."
(c) DOD Directive 5160.14, "Single Manager Service Assignment for Traffic Management Within the United States."
(d) DOD Instruction 4500.13, "Transportation of Household Goods of Uniformed Personnel by Motor Van Carriers," February 20, 1958, as amended (cancelled herein).
(e) DOD Instruction 4500.21, "Transportation of Unerated Household Goods of Uniformed Personnel by Freight Forwarders," October 13, 1955, as amended (cancelled herein).
(f) DOD Directive 4500.26, "Transportation of Unerated Household Goods of Military and Civilian Personnel," December 8, 1959, as amended (cancelled herein).

I. PURPOSE, APPLICABILITY AND OBJECTIVE

A. This Directive assigns authority and responsibilities and establishes policies relative to the transportation of household goods of military and civilian personnel of the Department of Defense (1) between points within the United

States and (2) between the United States and other areas in through bill of lading service, when the transportation is procured and arranged by an agency of the Department of Defense.

B. The objective of this Directive is to assure high quality service to military and civilian personnel of the Department of Defense in the transportation of their household goods at the lowest over-all cost to the Government.

II. CANCELLATIONS

References (d), (e), and (f) are cancelled.

[fol. 43]

III. DEFINITIONS

As used herein—

A. "Lowest over-all cost" means the aggregate of all costs which are known or can reasonably be estimated in connection with a shipment (including accessorial charges and amounts paid by the Government for loss and damage).

B. "United States" means the forty-eight contiguous states and the District of Columbia.

IV. POLICIES

A. *Comparative Costs Among Modes of Transportation.*

Section 303(e) of the Career Compensation Act of 1949, as amended (63 Stat. 802), provides in part that ". . . members of the uniformed services . . . in connection with a change of station (whether temporary or permanent) [shall be entitled] to transportation (including packing, crating, drayage, temporary storage and unpacking) of baggage and household effects, or reimbursement therefor . . . without regard to the comparative costs of the various

modes of transportation." However, comparative costs of the various modes of transportation may be disregarded only when all carriers within the mode(s) which would produce the lowest overall cost to the Government cannot provide the required services satisfactorily. In such instances the next lowest cost mode in which carriers can provide satisfactory service shall be used. The same principle shall apply in shipping household goods of civilian personnel when the transportation is procured and arranged by an agency of the Department of Defense.

B. *Quality of Service*

The quality of service provided by carriers shall be evaluated, in comparison with uniform standards prescribed by the Single Manager for Traffic Management, on the basis of all available information, including, but not limited to, the following:

1. Reports of inspections of carrier facilities, transportation equipment, and service practices.
2. Carrier performance reports by military and civilian personnel in connection with the transportation of their household goods.
3. Official reports and actions by regulatory bodies which serve as factual indicators of carrier performance.

[fol. 44] 4. Claims for loss and damage filed against carriers and the Government, and settlements thereof.

C. *Qualified Carriers*

Only those carriers shall be qualified which:

1. Are authorized according to law to provide the required services;

2. Provide adequate evidence of satisfactory transportation equipment and financial responsibility and reliability;
3. Have made specific arrangements for the use of a satisfactory terminal facility consisting of a warehouse, loading and unloading area, and office sufficiently near the shipping activity or point of origin of the shipment to assure satisfactory service and permit ready inspection of the facility and the household goods stored or serviced therein;
4. When required, have executed and filed with the appropriate office a household goods service tender or other document authorized in lieu thereof;
5. Assume full responsibility for arranging for placing in a satisfactory terminal facility those shipments which require storage in transit at destination; and
6. Provide high quality service.

D. *Selection of Carrier and Distribution of Traffic*

1. Only those carriers shall be used which satisfy the requirements of IV. C. at the lowest over-all cost to the Government. Connecting carriers on a joint carriage arrangement must meet all of the requirements for a qualified carrier except IV. C. 3. and also IV. C. 5 when they are not terminating carriers.
2. To the extent practicable, traffic shall be distributed by destination state or other area outside the United States among these carriers in equitable proportions, subject to the following:

   a. Carriers' ability to respond to requirements of the traffic offered for movement. When a carrier is offered a shipment and cannot perform, the carrier shall be charged with the offer in the same manner as if it had performed.

[fol. 45]

b. At each shipping activity, additional shipments shall be offered to a carrier or carriers who it has been determined that it or they provide an exceptionally high quality of service as compared with other carriers serving the activity. Such shipments shall not be charged to normal distribution.

3. For traffic distribution purposes, carriers under effective common financial or administrative control shall be treated as a single carrier. The service tender, or document in lieu thereof, filed by each carrier shall include: (a) name(s) of any other carrier(s) serving the same shipping activity which are under effective common financial or administrative control with the filing carrier, or (b) a statement that the filing carrier is independent in finance and administration from all other carriers serving the same shipping activity.

4. When consistent with other provisions of this paragraph (IV. D.),

a. A request by the property owner for non-use of a carrier because of specific prior unsatisfactory service shall be honored if another carrier is available to move the shipment at the same over-all cost to the Government.

b. A preference for a carrier expressed by the property owner shall be honored.

5. Traffic shall be distributed according to the originating carrier rather than according to agent. When a joint carriage arrangement is utilized, shipments transported thereunder shall be considered as having been received by each participating carrier qualified to serve the origin point.

6. Records of traffic distribution shall be maintained by destination state or other area outside the United States.

E. *Non-use of Carriers*

1. Carriers which have indicated in writing a desire to participate in Department of Defense traffic and are not considered to be qualified shall be notified in writing of their deficiencies. Such carriers shall be provided an opportunity to (a) appeal the decision, or to (b) receive further consideration after correcting the deficiencies causing the refusal.

[fol. 46] 2. Carriers which have been qualified, but which subsequently fail to provide high quality service, fail to meet the other requirements of IV. C., or commit unethical acts, shall be suspended in accordance with criteria and procedures established by the Single Manager for Traffic Management. Such carriers shall be provided an opportunity to (a) appeal the decision, or (b) request requalification after correcting the deficiencies causing the suspension.

F. *Use of Storage in Transit*

When commercial temporary storage is required in connection with transportation storage in transit, as defined in carriers' tariffs, shall be used except when it is clearly evident, after considering such factors as over-all cost, and liability of the carrier versus that of the warehouseman, that the best interest of the Government and the property owner can be served only by the use of contract storage.

G. *Use of Untied States Carriers*

1. The contracting carrier shall be a United States organization owned and controlled by

citizens of the United States except when the Single Manager for Traffic Management has determined that a United States carrier cannot provide timely movement.

2. When commercial ocean or air carriers or operators are to be used as a part of through bill of lading service between the United States and other areas, only ships of United States registry engaged in regular berth service or United States flag aircraft shall be used except when the Single Manager for Ocean Transportation or the Single Manager for Airlift Service, respectively, has determined they are not available for timely movement.

V. IMPLEMENTATION

A. The Single Manager for Traffic Management (reference (e)) is assigned authority and responsibility for:

1. Implementing this Directive by prescribing, in agreement with the heads of the other military services, uniform joint regulations which will include but not be limited to: (a) service tenders or other documents authorized in lieu thereof; (b) standards for quality of service; (c) procedures for measuring and comparing the quality of service provided by carriers; (d) criteria and procedures for offering additional shipments and for qualifying, selecting, and suspending carriers; and (e) standards, formulae, and procedures for determining the lowest overall cost.

[fol. 47] 2. Assuring compliance with the above-mentioned regulations. Compliance will be accomplished through command channels of the military services, by appropriate means, including action based on recommendations by representatives of the Military Traffic

Management Agency resulting from staff visits to all activities of the military services within the United States which ship household goods.

3. Negotiating with commercial carriers and operators on all matters incident to the transportation of household goods within the United States and between the United States and other areas in through bill of lading service. Negotiations with commercial air or ocean operators for transportation as a part of through bill of lading service between the United States and other areas, or with air carriers for service within the United States under long term contracts, shall be conducted by the Single Manager for Airlift Service (reference (a)) or the Single Manager for Ocean Transportation (reference (b)). The agreement of the Single Manager for Traffic Management shall be secured prior to the initiation of such negotiations.

B. The service tenders or other documents authorized in lieu thereof referred to in V. A. 1. shall require carriers providing through bill of lading service between the United States and other areas to furnish after the fact reports of shipments to the Single Manager for Traffic Management, the Single Manager for Ocean Transportation, and the Single Manager for Airlift Service, as prescribed by uniform joint regulations.

C. The Single Manager for Traffic Management shall consult with the Small Business Administration and appropriate representatives of the transportation industry on those portions of joint procedures, standards, criteria and regulations directly affecting the transportation industry prior to their publication.

D. The Single Manager for Traffic Management shall develop, with the joint participation of

the heads of the other military services, all standards, programs and procedures relative to the transportation of household goods. He shall also keep the Single Manager for Ocean Transportation and the Single Manager for Airlift Service informed on plans and other matters involving through bill of lading service between the United States and other areas.

E. The implementation of this Directive shall not abrogate the functions and responsibilities of the Single Manager for Airlift Service or the Single Manager for Ocean Transportation, nor, in overseas areas, of the military services or the unified or specified commands.

[fol. 48]

VI. REQUIRED ACTION

A. Joint regulations implementing this Directive shall be issued and action taken to assure uniformity of application in accordance with the schedule in VI. C. Such regulations, amendments thereto, and reissues thereof shall be coordinated with the Assistant Secretary of Defense (Supply and Logistics) prior to publication, and two copies of such documents shall be forwarded to him within thirty days after publication.

B. Provisions of all regulations of the Military Departments implementing references (d) and (e) shall remain in effect until superseded by the joint regulations implementing this Directive.

C. The schedule for implementation of this Directive is:

September 1, 1960—Completion of printing and distribution of Implementing Regulations.

September 7 — December 1, 1960 — Conduct conferences with Transportation Officers throughout the United States and overseas

areas. Carriers will be invited to similar conferences.

December 1, 1960—Effective date of Implementing Regulations.

VII. EFFECTIVE DATE

This Directive is effective upon publication.

/s/ Thomas Gates
Secretary of Defense

[fol. 49] ATTACHMENT TO MOTION

AFFIDAVIT

District of Columbia) ss.

Frederick W. Denniston, first being duly sworn, on his oath deposes and says: That he is Assistant Commissioner, Transportation and Public Utilities Service of the General Services Administration, United States Government, that he is familiar with the issues before the Court in *United States* v. *Public Service Commission of Georgia*, and that he is familiar with the laws and regulations relative to the procurement of transportation services for the mass movements of household goods and personal effects of employees of the civilian executive agencies of the United States Government.

The purpose of this affidavit is to apprise the Court of the Federal law and administrative orders under which the transportation of household goods owned by employees of the executive agencies of the U. S. Government is undertaken.

The basic legislation on this subject is provided in the Act of August 2, 1946, 60 Stat. 806, as amended, (5 U.S.C. § 73b-1). This provides, as relevant:

"§ 73b-1. Travel, transportation and storage expenses—Transferred employees; advancement of funds; limitations.

"(a) Under such regulations as the President may prescribe, any civilian officer or employee of the Government who, in the interest of the Government, is transferred from one official station to another, in-
[fol. 50] cluding transfer from one department to another, for permanent duty, shall, except as otherwise provided in this section, when authorized or approved by such subordinate official or officials of the department concerned as the head thereof may designate for the purpose, be allowed and paid from Government funds the expenses of travel of himself and the expenses of transportation of his immediate family (or a commutation thereof in accordance with section 73a of this title) and the expenses of transportation, packing, crating, temporary storage, drayage, and unpacking of his household goods and personal effects (not to exceed seven thousand pounds net weight); uncrated or eight thousand seven hundred and fifty pounds if crated . . . .

"(b) In lieu of the payment of actual expenses of transportation, packing, crating, temporary storage, drayage, and unpacking of household goods and personal effects, in the case of such transfers between points in continental United States, reimbursement shall be made to the officer or employee on a commuted basis (not to exceed the amount which would be allowable for the authorized weight allowance) as such rates per one hundred pounds as may be fixed by zones in regulations prescribed by the President . . ."

Regulations have been promulgated by the Bureau of the Budget under Presidential Delegation No. 10530 of May 10, 1954, 3 C.F.R., 1954 Supp., P. 55, as amended, regarding the commuted rate system. One of these is Bureau of the Budget Circular No. A-37 of December 30, 1957, which provides regulations governing the transportation of household goods and personal effects of

civilian employees upon transfer of official station within the continental United States. This regulation provides for the use of government bills of lading instead of the commuted rate system for mass movements of household goods and personal effects of personnel transferred between the same two official stations when significant savings to the Government in transportation costs will result.

This basic legislation and the Bureau of the Budget orders have been implemented by General Services Ad- [fol. 51] ministration orders. The implementation is pursuant to the authority vested in the Administrator of General Services by Sec. 201 of the Federal Property and Administrative Services Act of 1949, as amended, 40 U.S.C. 481:

> "Sec. 201. (a) The Administrator shall, in respect of executive agencies, and to the extent that he determines that so doing is advantageous to the Government in terms of economy, efficiency, or service, and with due regard to the program activities of the agencies concerned—
>
> "(1) prescribe policies and methods of procurement and supply of personal property and nonpersonal services, including related functions such as contracting, inspection, storage, issue, property identification and classification, transportation and traffic management, management of public utility services, and repairing and converting; and
>
> • • • • •
>
> "(3) procure and supply personal property and nonpersonal services for the use of executive agencies in the proper discharge of their responsibilities, and perform functions related to procurement and supply such as those mentioned above in subparagraph (1): *Provided*, That contracts for public utility services may be made for periods not exceeding ten years; and • • •"

Attached hereto and made a part hereof is a copy of GSA Order TPS 7460.1, dated March 15, 1960, which establishes procedures for handling mass movements of

household goods and personal effects. This order is promulgated by the Commissioner, Transportation and Public Utilities Service, pursuant to a delegation of authority from the Administrator (ADM 5450.3, Change 4, of July 31, 1959). Also attached is a copy of Circular No. A-37, Transmittal Memorandum No. 4 of the Executive Office of the President (Bureau of the Budget) which provides for the amendment of regulations to permit the [fol. 52] use of government bills of lading for transportation of household goods instead of the commuted rate system, for mass movements of household goods transferred between the same two official stations when significant savings will result.

The Federal Property and Administrative Services Act of 1949, as amended, *supra*, Sec. 302(c), provides that all purchases and contracts for property and services shall be made by advertising, as provided in Sec. 303 of the same Act. Purchases and contracts may be negotiated without advertising only in certain limited circumstances.

The legislation and implementing orders apply uniformly to intrastate as well as interstate traffic.

[fol. 53] Frederick W. Denniston deposes and says: That he has read the foregoing and attachments thereto, and knows the contents thereof, and that the matter and things therein stated are true of his own knowledge, save and except those matters therein stated on information and belief, and as to those he believes them to be true.

FREDERICK W. DENNISTON

Subscribed and sworn to before me this 16th day of May, 1961

CHARLES E. MILFORD
Notary Public

My commission expires August 14, 1961.

GSA-WASH DC 61-12363

[fol. 54] ATTACHMENT TO AFFIDAVIT

GENERAL SERVICES ADMINISTRATION
Washington 25, D. C.

TPS 7460.1
March 15, 1960

GSA ORDER

SUBJECT: Procedures for Handling Mass Movements of Household Goods and Personal Effects

1. PURPOSE: This order promulgates procedures for handling mass movements of household goods and personal effects of employees of civilian agencies, upon transfer of official station within the continental United States, in accordance with the provisions of Bureau of the Budget Circular No. A-37 of December 30, 1957, as amended by Transmittal Memorandum No. 4, dated February 20, 1960.

2. BACKGROUND: Bureau of the Budget Circular No. A-37, as amended, provides for the use of Government bills of lading, instead of the commuted rate system, for mass movements of household goods transferred between the same two official stations when significant savings will result. The responsibility for the traffic management of such movements for civilian agencies has been assigned to GSA.

3. OBJECTIVE: The objective is to evaluate mass movements of household goods and personal effects and, when feasible, to negotiate with carriers to effect the most economical basis for the movement of such household goods and personal effects.

4. APPLICABILITY: The procedures contained in the attachment to this order are applicable to all GSA employees when engaged in the handling of mass movements of household goods and personal effects for civilian agencies.

5. EFFECTIVE DATE: The provisions of this order shall become effective April 1, 1960.

[fol. 55]

6. FORMS: This order requires the use of the following forms: Standard Form 32 (Oct. 1957 Edition), General Provisions (Supply Contract); Standard Form 33, Invitation, Bid, and Award; Standard Form 36, Continuation Sheet (Supply Contract); and GSA Form 1465, General Services Administration, Transportation and Public Utilities Service Contract.

/s/ Thomas A. Kennedy
for
SAMUEL J. SCOTT
Commissioner
Transportation and Public Utilities Service

GSA WASH DC 60-10573

Distribution: A, B, C (TPS and LT only), F, G, H (TPS only) Attachment

[fol. 56]

TPS 7460.1
March 15, 1960

ATTACHMENT

1. GENERAL. Bureau of the Budget Circular No. A-37 of December 30, 1957, prescribes regulations governing the transportation of household goods and personal effects of civilian employees upon transfer of official station within the continental United States. These regulations, as amended by Transmittal Memorandum No. 4, dated February 20, 1960, (see Appendix A) provide for the use of Government bills of lading, instead of the commuted rate system, for mass movements of household goods and personal effects of personnel transferred between the same two official stations when significant savings to the Government in transportation costs will result.

2. CRITERIA FOR USE OF GOVERNMENT BILL OF LADING METHOD. The Government bill of lading method, prescribed by Bureau of the Budget Circular No. A-37, as amended by Transmittal Letter No. 4, dated February 20, 1960, shall be used when the following criteria are met:

a. When the estimated aggregate weight of the household goods and personal effects of a group of employees of a civilian agency, to be moved between the same two official stations over a period of one year (or over a longer period if the agency believes there is opportunity for substantial savings), is fifty thousand (50,000) pounds or more. (Such a movement, for the purpose of this order, shall be considered a "mass movement"); and

b. When the amounts which the Government would pay under the commuted rate system would exceed by ten percent (10%) or more the cost for transportation services of satisfactory quality under the GBL method; or, when the cost difference is less than ten percent (10%) but the dollar amount of the savings is so substantial (due to weights and distances of

shipments) that use of the GBL method is deemed by the agency to be justified.

3. REQUESTS FROM CIVILIAN AGENCIES. When GSA receives information from civilian agencies regarding proposed mass movements of household goods and personal effects of employees to be transferred between official stations in continental United States, [fol. 57] or receives requests from civilian agencies for traffic management advice and assistance relative to such shipments, the matter shall be forwarded immediately to the Commissioner, TPUS, or the appropriate Regional Director, TPUS.

4. INFORMATION REQUIRED. Upon receipt of a request for traffic management advice or assistance in connection with a mass movement of household goods or personal effects, TPUS shall obtain adequate information to establish specifications (see paragraph 9.c., below), for the moving services required, to obtain bids or offers from eligible carriers, to determine the feasibility of making shipments on Government bills of lading, and when appropriate, to arrange for transportation contracts with carriers for the moving services. This information shall include:

a. Full name of agency, office, or activity to be transferred;

b. Official station (city and state) from which transfer will be made;

c. Official station (city and state) to which transfer will be made;

d. Number of employees to be transferred who will ship household goods or personal effects;

e. Estimated aggregate weight of the household goods and personal effects to be shipped by the group of employees to be transferred, as well as estimated weight of each individual shipment;

f. Number of employees who will move a piano or any other article which may require the use of heavy

lift or special equipment for removal from present location or placement in new location;

g. Date on which first shipment will be ready to move;

h. Anticipated date of completion of the last shipment in the mass movement;

i. The exact point of origin of any shipments which will originate at addresses which are more than 25 miles outside the boundaries or city limits of the [fol. 58] official station from which the group transfer will be made;

j. The exact point of destination of any shipments which will be made to addresses which are more than 25 miles outside the boundaries or city limits of the official station to which the employees will be transferred; and

k. Any other information that may be required to comply with Bureau of the Budget Circular No. A-37, as amended by Transmittal Memorandum No. 4, dated February 20, 1960.

The 25-mile zones prescribed in subparagraphs i and j, above, conform, generally, to the commercial practices of the household goods carriers. These zones have been established as guidelines only and are not to be construed as maximum distances for the purpose of inviting bids or requesting offers from carriers for rates and services.

5. EVALUATION OF INFORMATION. The information received under paragraph 4., above, shall be evaluated to determine the approximate quantity of goods to be shipped and the similarity and general patterns of the individual shipments. This evaluation will reveal whether or not the quantity is sufficient or the individual shipments are sufficiently similar to justify inviting bids or requesting offers from eligible carriers. For example, if only a small proportion of the individual shipments comprising a proposed mass movement will originate or terminate outside the 25-mile radius of the official station, that

factor should not preclude negotiation or advertising for a mass movement. However, if the information shows that a substantial number of the individual shipments will originate or terminate at various points outside the 25-mile origin and destination zones, so as to prevent a grouping of a sufficient number of shipments with similar origins and destinations, the proposed mass movement may not be susceptible to inviting bids or requesting offers of rates which may produce substantial savings as provided in paragraph 2.b., above.

6. DETERMINING SERVICES REQUIRED. Before inviting bids or requesting offers from carriers for mass movements of household goods and personal effects, TPUS shall determine the type and extent of the services which the carrier will be required to perform. Specifications containing the terms and conditions for performing such services shall conform to the standards set forth in paragraph 9.c., below. These specifications provide a uniform basis upon [fol. 59] which the interested carriers may submit bids or offer rates for the movement. Such specifications shall be made a part of the transportation contract.

7. REQUESTING RATES FROM CARRIERS.

a. *General.* When the evaluation by TPUS indicates that savings to the Government as provided in paragraph 2.b., above, may result from arranging with carriers for rates for a mass movement of household goods and personal effects, TPUS shall request eligible carriers to submit rate offers or bids.

b. *Methods Used.*

(1) *Formal Advertising.* Except when the exigency of the movement precludes such action, all requests for rates for mass movements of household goods and personal effects shall be made by formal advertising on Standard Form 33, Invitation, Bid, and Award. A copy of the specifications outlining the services required and the terms and conditions under which they will be performed, as

set forth in paragraph 9.c., below, shall be attached to each Standard Form 33.

(2) *Negotiation.* When the exigency of the movement will not admit the delay incident to formal advertising, negotiation for the services is authorized. When negotiation is necessary, all information normally included in formal advertising, including a statement of the services required and the terms and conditions under which they will be performed, shall be furnished to the carriers. If requests for offers are made orally, such requests shall be confirmed promptly in writing, accompanied by the written specifications. When negotiation is deemed necessary, the file shall contain appropriate Findings and Determination.

c. Unit Price. Carriers shall be requested to furnish rate offers or bids on the basis of a single rate per 100 pounds to cover *all* of the services which the carrier would be required to perform under the specifications to provide the owner of the property with a complete moving service.

[fol. 60] d. *Eligible Carriers.* All certificated household goods carriers who can provide through moving services from the origin area to the destination area shall be given an opportunity to submit rate offers or bids for mass movements of household goods and personal effects. Eligible carriers shall include independent movers as well as those firms who are members of the various household goods movers' associations or representatives of nation-wide van lines.

8. DETERMINING METHOD OF SHIPMENT. TPUS shall evaluate the rate offers or bids received from carriers and determine the estimated cost of the mass movement of household goods and personal effects on Government bills of lading, and shall inform the interested civilian agency. The agency effecting the transfer will make the final determination as to whether a contract will be made with a carrier for shipment of the goods on Government bills of lading

or whether the commuted rate system will be used. When requested, TPUS shall advise and assist the agency in its determination.

9. CONTRACTING FOR TRANSPORTATION SERVICES.

a. *General.* If the civilian agency decides, after evaluation of the transportation cost information and advice furnished by TPUS, that it will be advantageous to the Government to ship the household goods and personal effects of the mass movement on Government bills of lading, a transportation contract must be entered into between the carrier and the United States Government to cover performance of the required services pursuant to the prescribed specifications. The preparation of documentation, payment of the carrier's bills, and performance of all other functions incident to the shipments are responsibilities of the civilian agency. However, when requested, TPUS shall perform these functions for the agency.

b. *Forms to be Used.*

(1) *Formal Advertising.* When the rates are obtained by formal advertising, the award shall be made on Standard Form 33, Invitation, Bid, and Award. The following additional forms shall be [fol. 61] attached to Standard Form 33 and made a part of the contract:

(a) Standard Form 36, Continuation Sheet (Supply Contract), when required;

(b) Specifications for the movement; and

(c) Standard Form 32 (Oct., 1957 Edition), General Provisions (Supply Contract).

(2) *Negotiated Contract.* When the rates are obtained through negotiation, a contract will be prepared on GSA Form 1465, General Services Administration, Transpotration and Public Utilities Service Contract. The following additional forms shall be attached to GSA Form 1465 and made a part of the contract:

(a) Specifications for the movement; and

(b) Standard Form 32 (Oct., 1957 Edition), General Provisions (Supply Contract).

c. *Specifications for the Movement.* Specifications for the movement of household goods and personal effects for each mass movement shall be prepared and made an integral part of the transportation contract. These specifications shall describe the services required and outline the terms and conditions for performance. The specifications shall be prepared in the format shown below and shall contain all of the terms, conditions, and provisions listed. No deviations from these standards shall be made unless specifically authorized by the Commissioner, TPUS.

. . . . .

(Date)

SPECIFICATIONS
FOR
MOVEMENT OF HOUSEHOLD GOODS AND PERSONAL EFFECTS OF GOVERNMENT EMPLOYEES TRANSFERRED FROM (City and State) TO (City and State) INCIDENT TO THE RELOCATION OF (Name of Agency)

[fol. 62]

SERVICES REQUIRED: The Contractor shall perform all the services required to remove the property from its present location, transport it to the new location, and place the property in the new location pursuant to the instructions of the owner of the property. These services shall include packing and/or crating required for safe transportation; disassembling the property when necessary; pickup of the property at its present location; transportation of the property to destination; delivery of the property to its new location; unpacking and/or uncrating as required; reassembling any of the property which was disassembled for transportation; placement of the property in the new location as specified by the

owner or his representative; and any other service which would normally be included in a complete moving service. The property to be moved, the present location, and the new location are as specified in this Contract.

PROPERTY TO BE MOVED: The property to be moved under this Contract consists of the household goods and personal effects which are the property of those Government employees who are transferred from (City and State) to (City and State) incident to the relocation of (Name of Agency). The aggregate weight of the individual shipments has been estimated by (Name of Agency) to be pounds. This estimate is based upon the anticipated transfer of approximately employees, each having an average of pounds of household goods and personal effects. However, this weight is not to be construed as a guarantee of the actual weight of such property, which may be in excess of or less than the said estimated weight. The Government does not guarantee any particular volume of traffic described herein.

PRESENT LOCATION: The property to be moved under this Contract is located at the addresses to be specified by the owners of the property anywhere within (City and State) and within a radius of miles from the city limits of (City and State).

NEW LOCATION: The new location to which the property shall be moved under this Contract is the address to be specified by each of the owners of the property anywhere within the city of (City and State) and within a radius of miles from the city limits of (City and State).

[fol. 63]

LABOR, MATERIALS, AND EQUIPMENT: The Contractor shall furnish all the labor, materials, and equipment necessary to perform all the services contemplated under this Contract in an orderly, timely, and efficient manner.

PACKING AND OR CRATING AND PADDING: The Contractor shall perform all of the packing and/or crating and padding necessary for the protection of the property to be transported. All packing containers, including, but not limited to, barrels, boxes, wardrobes, and cartons; all crating materials; and all padding materials and equipment, shall be furnished by the Contractor. The Contractor shall also furnish or cause to be furnished, when necessary, padding or other protective materials for the interior of the buildings, including elevators, from and to which the property shall be moved under this Contract.

DISASSEMBLING AND REASSEMBLING OF PROPERTY: The disassembling of property, such as beds and sectional bookcases, when necessary for the safe and efficient transportation of the property, shall be performed by the Contractor. When it is necessary to disassemble property for shipment, such property shall be reassembled by the Contractor upon delivery at the new location.

UNPACKING AND OR UNCRATING AND PLACEMENT OF PROPERTY: The Contractor shall perform all unpacking and or uncrating of property which was packed and/or crated for movement under the provisions of this Contract. The Contractor shall also place the property in the new location as instructed by the owner of the property or his authorized representative.

CONSOLIDATION OF SHIPMENTS: The Contractor shall have the right to consolidate two or more shipments of property under this Contract, or to consolidate shipments of property under this Contract with commercial shipments of household goods and personal effects; provided, however, that such consolidation shall not prevent the completion of any shipment of property hereunder within the time limitation set forth in this Contract.

[fol. 64]

TIME LIMITATION: All services under this Contract shall be performed promptly. Shipments of property, whether or not held for consolidation, shall be completed within (days) from the date on which the owner advises the Contractor that the property is available for shipment, unless a longer period of time in which to ship is agreed to by the owner of the property. Completion of shipments as herein referred to shall include placement of the property in the new location as instructed by the owner of the property or his authorized representative.

AUTHORIZATION FOR SHIPMENTS: (Name of Agency) will furnish the Contractor a list of the names and addresses of the Government employees who are authorized to move their household goods and personal effects under this Contract. The owner of the property will make a request to the Contractor for shipment, specifying the date on which the property will be available for shipment. The owner shall also furnish the Contractor with the complete address of the new location to which the property shall be delivered. When making request for shipment, the owner of the property shall furnish a copy of his travel orders as proof of authorization for shipment of his property under this Contract.

BILLS OF LADING: A Government bill of lading will be issued by (Name of Agency) to cover each shipment made under this Contract.

RELEASED VALUE OF PROPERTY: All shipments made under this Contract shall be released to a value not exceeding thirty cents (30c) per pound per article.

BASIS FOR CHARGES: Charges for all of the services performed under this Contract shall be assessed on the weight of the property transported at the rate of per one hundred (100) pounds. The weight of the property upon which the

charges are assessed shall be determined as herein provided.

BASIS OF WEIGHT: (a) The tare weight of each vehicle used in the transportation of household goods and personal effects shall be determined by having it weighed prior to the transportation of each shipment, without the crew thereon, by a certified [fol. 65] weighmaster on a certified scale, and when so weighed, the gasoline tank on each such vehicle at time of weighing shall be full and the vehicle shall contain all blankets, pads, chains, dollies, hand trucks, and other equipment needed in the transportation of such shipment.

(b) After the vehicle has been loaded it shall be weighed, without the crew thereon, prior to delivery of the shipment. This weight shall be considered as the gross weight.

(c) The net weight of the shipment shall be determined by deducting the tare weight from the gross weight.

(d) In the transportation of part loads, the provisions of (a), (b) and (c) shall apply in all respects, except that the gross weight of a vehicle containing one or more part loads may be used as the tare weight of such vehicles as to part loads subsequently loaded thereon.

(e) For the purpose of applying the maximum weight limitations, the weight of the household goods and personal effects of each employee must be identified. If scales are not available at point of origin, at any point en route, or at destination, a constructive weight based on seven (7) pounds per cubic foot of properly loaded van space may be used. Such constructive weight also may be used for a part load when its weight could not be obtained at origin, en route, or at destination, without first unloading it or other part loads being carried in the same vehicle.

(f) All tare and gross weights shall be properly certified to by the person or persons who ascertained such weights.

(g) All vouchers submitted for payment under this Contract, shall be supported by certified scale tickets to cover the actual tare and gross weights. When constructive weights, as provided in subparagraph (e), above, are used, such weights shall be supported by certificates justifying the use of each constructive weight. These certificates shall be submitted with vouchers for payment of transportation charges.

[fol. 66]

PERMITS AND OPERATING AUTHORITY: The Contractor shall secure from the proper official, office, or Government regulatory body all permits or operating authorities necessary for the performance of the services under this Contract.

CARGO INSURANCE: The Contractor shall furnish to General Services Administration certificate or certificates of insurance, satisfactory to it, for cargo insurance (including household goods and personal effects), of not less than $25,000.00, to cover each transportation vehicle used to perform the services under this Contract.

DAMAGE AND INJURY: The Contractor assumes responsibility for all damage or injury to persons or property occasioned through the use and operation of its vehicles by, or the action of, the Contractor, its employees and agents, and the Contractor, at its own expense, shall maintain adequate public liability and property damage insurance during the continuance of this Contract, insuring itself against all claims for injury or damage; also, Workmen's Compensation, and other legally required insurance with respect to its own employees and agents. The Government shall in no event be liable or responsible for damage or injury to any person or property occasioned through the use or operation of any vehicle by, or the action of, the Contractor, its employees and agents, in performing under this Contract.

COMPLIANCE WITH APPLICABLE LAWS: In the performance of this Contract, the Contractor shall

comply with and give all stipulations and representations required by any applicable Federal, State, Municipal or local law or executive order or any applicable rules, orders, regulations or requirements of any Government department or bureau, but nothing herein contained shall be considered as preventing the Contractor from contesting in good faith the validity of such law, rule, order, regulation or requirement or any charge that the Contractor has not complied therewith.

FINANCIAL STATEMENT: The Contractor shall promptly, upon request by the Government, furnish the Government with a current certified statement of its financial condition and such data as the Government may request with respect to its operations in order to determine Contractor's ability to perform under this Contract and its financial responsibility.

[fol. 67]

DURATION OF CONTRACT: The services outlined under this Contract shall be available on the terms, conditions, and specifications herein stated for a period of (time) from the date of the execution of this Contract by the Government.

. . . .

10. LIMITED GOVERNMENT LIABILITY FOR LOSS OR DAMAGE. The Comptroller General of the United States has advised that "when an employee of the United States avails himself of any right he may have acquired under the law to have his household effects transported at Government expense, such right as well as the liability of the Government is limited by the specific provisions of law and regulation authorizing the expenditure of public funds for that purpose. In those cases where the shipment of an employee's household effects at Government expense is authorized and requested by the employee, the Government undertakes such shipment upon the same basis as it would ship its own property, that is, by Government Bill of Lading which carries a lower

rate as well as a limited responsibility for loss or damage on the part of the carrier. This is a standard policy of long standing and since the laws and regulations pertaining to the shipment of household effects of civilian employees contain no provision for indemnifying the employee for loss or damage in excess of the limited liability assumed by the carrier under a Government Bill of Lading, it is incumbent upon the employee to procure private insurance if he is unwilling to assume the same risks with respect to his effects as the Government assumes in shipping its own property." (Comp. Gen. B-92393, dated April 27, 1950). Therefore, TPUS offices receiving requests from civilian agencies for assistance in arranging for a mass movement of household goods or personal effects on Government bills of lading shall advise the agency accordingly.

[fol. 68] ATTACHMENT TO AFFIDAVIT

APPENDIX A

Bureau of the Budget Household Goods Regulations

TPS 7460.1
March 15, 1960

EXECUTIVE OFFICE OF THE PRESIDENT
BUREAU OF THE BUDGET
Washington 25, D. C.

February 20, 1960

CIRCULAR NO. A-37
Transmittal Memorandum No. 4

TO THE HEADS OF EXECUTIVE DEPARTMENTS AND ESTABLISHMENTS

SUBJECT: Regulations prescribing revised commuted rates of reimbursement for transportation and temporary storage expenses for household goods and personal effects of civilian officers and employees upon transfer of official station within the continental United States (use of Government bills of lading or the commuted rate system for mass movements of employees' household goods)

1. *Purpose.* The regulations prescribed in Bureau of the Budget Circular No. A-37 of December 30, 1957, as last amended by Transmittal Memorandum No. 3 of October 22, 1959, are amended as provided in Attachment A. The purpose of the amendment is to provide for use of Government bills of lading for transportation of household goods, instead of the commuted rate system, for mass movements of household goods transferred between the same two official stations when significant savings will result.

2. *Evaluation.* Arrangements have been made with the General Services Administration (for mass movements involving civilian agencies) and the Department of De-

fense (for mass movements of its civilian employees) to furnish evaluation reports covering the mass movements analyzed from April 1, 1960, through March 31, 1961.

3. *Effective date.* The amendment shall apply to transfers of employees ordered on or after April 1, 1960.

ELMER B. STAATS
Acting Director

Attachment

[fol. 69]

ATTACHMENT A

AMENDMENTS TO REGULATIONS GOVERNING PAYMENT OF TRAVEL AND TRANSPORTATION EXPENSES OF CIVILIAN OFFICERS AND EMPLOYEES OF THE UNITED STATES WHEN TRANSFERRED FROM ONE OFFICIAL STATION TO ANOTHER FOR PERMANENT DUTY

1. Title II, "Transportation of household goods and personal effects within the continental United States," is amended to read:

Section 12. *Determination of weight.* The obligation of the Government to pay for costs of transporting employees' household goods and personal effects shall be limited to payments for 7,000 pounds *net* weight for employees with immediate families and to 2,500 pounds *net* weight for employees without immediate families. (See section 6.) When household goods and personal effects are transported *uncrated* their actual weight, including containers and packing materials, shall be considered as the net weight. When the household goods and personal effects are *crated* the net weight shall be computed at 80% of the gross weight.

Section 13. *Commuted rate system.*

(a) Under the commuted rate system, employees make their own arrangements for transporting their

household goods and personal effects. They pay the carriers and are reimbursed by the Government for costs of transportation, packing, crating, drayage and unpacking at rates per hundred pounds specified in Schedule A of these regulations. In addition, employees are reimbursed for costs of temporary storage at the commuted rates specified in Schedule A for temporary storage.

(b) The commuted rate system shall be used when (1) an individual employee is transferred, (2) a group of employees is transferred between the same official stations but the aggregate estimated weight of their household goods and personal effects is less than 50,000 pounds, and (3) a group of employees is to be transferred between the same official sta-
[fol. 70] tions with household goods and personal effects estimated to aggregate 50,000 pounds or more but the estimated savings in transportation costs under the GBL method are not sufficient to justify its use. (See section 14(a).)

(c) As a general guide in estimating the weight of household goods to be moved, for the purposes of sections 13(a) and (g) and 14(a) through (d), the number of rooms in which the property is located (not including bathrooms, closets, and reception hallways) may be multiplied by 1,000.

(d) When the commuted rate system is used, the amount to be paid to the employee for transportation and related services is computed by multiplying the number of hundreds of pounds shipped (as shown on original bills of lading or other evidence of weight shipped) by the applicable rate per hundred pounds for the distance shipped as shown in Schedule A. (Subject to the maximum weight allowances stated in section 12.) The distance shall be determined in accordance with household goods mileage guides filed with the Interstate Commerce Commission. If the rate is not shown in Schedule A for the exact mileage, the rate shown for the next greater distance shall apply. If the weight transported is less than the minimum weight

charged, the reimbursement shall be at the minimum weight charged, instead of the actual weight transported. The minimum weight charged by household goods carriers is 500 pounds, except that the minimum weight shall be 1,000 pounds for shipments between the following points if the point of origin or destination is more than five miles from specified highways: Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington, Wyoming, any point within a 25-mile radius of El Paso, Texas.

(e) When the commuted rate system is used for temporary storage, the amount to be paid to the employee shall be determined in accordance with the table of storage allowances in Schedule A: *Provided*, That the amount of reimbursement shall not exceed the amount actually paid for the storage.

[fol. 71]

(f) In support of claims for reimbursement under the commuted rate system employees shall submit (1) the original or a certified copy of the receipted warehouse bill for temporary storage and (2) in support of transportation, the original bills of lading of certified copies, or, if bills of lading are not available, other evidence showing point of origin, destination, and weight. If no adequate scale is available at point of origin, at any point en route, or at destination, a constructive weight; based on seven pounds per cubic foot of properly loaded van space, may be used. Such constructive weight also may be used for a part load when its weight could not be obtained at origin, en route, or at destination, without first unloading it or other part loads being carried in the same vehicle.

(g) Advances of funds may be made to employees up to the estimated amount of the commuted payment for the cost of transportation and temporary storage of their household goods and personal effects, under the procedures and policies prescribed under the Standardized Government Travel Regulations

(Bureau of the Budget Circular No. A-7, Revised) with respect to advances of funds for travel of employees. In requesting an advance of funds, the employee shall submit a written statement designating (1) the points of origin and destination, (2) the estimated weight of household goods and personal effects to be shipped (computed as provided in section 13(c)), and (3) any anticipated temporary storage (not to exceed two months at Government expense).

Section 14. *Government bills of lading.*

(a) When Government bills of lading (GBL's) are used in lieu of the commuted rate system, the Government assumes responsibility for dealings with carriers, including negotiating rates, selecting carriers, and auditing and paying transportation vouchers. Since these activities involve additional administrative expense for the Government, the GBL method shall be used only when actual transportation charges will be substantially below the amounts which the Government would be required to pay under the commuted rate system. Accordingly, the policy is as follows: (1) the GBL method will not
[fol. 72] be used when an individual employee or a group of employees with aggregate household goods estimated to weigh less than 50,000 pounds is being moved, (2) when a group of employees with aggregate household goods estimated to weigh 50,000 pounds or more is to be moved between the same two points during a period of not more than one year, an effort shall be made to obtain favorable transportation rates under the GBL method (an agency may, at its discretion seek favorable rates for such movements scheduled to take place during a period of more than one year if it believes there is reasonable opportunity for substantial savings), (3) the GBL method shall be used for such movements when the amounts which the Government would pay under the commuted rate system would exceed by ten percent or more the cost for trans-

portation services of satisfactory quality under the GBL method, (4) the GBL method also may be used when the cost difference is less than ten percent if the dollar amount of the savings is so substantial (due to weights and distances of shipments) that use of a GBL is deemed by the agency to be justified, and (5) the GBL method shall not be used for such movements if the criteria described in (3) and (4) are not met.

(b) When a group of employees of a civilian agency with household goods estimated to weigh 50,000 pounds or more is to be moved between the same official stations over a period of one year or less (or over a longer period if the agency believes there is opportunity for substantial savings), the agency shall furnish the General Services Administration with such specific information as the GSA may require in order to seek favorable transportation rates.

(c) When a civilian agency has advised the GSA concerning a mass movement of household goods, the GSA shall attempt to arrange favorable rates and shall inform the agency of the results of such efforts. GSA may, by agreement, delegate its responsibility to the agency concerned.

(d) After obtaining the results of GSA's efforts to arrange favorable rates, together with GSA's advice as to whether any of the rates offered should be accepted, a civilian agency shall apply the criteria described in section 14(a) in order to determine whether to use the commuted rate system or to issue Government bills of lading. The agency shall be responsible for issuing Government bills of lading, [fol. 73] paying the carriers' bills and performing all other functions incident to shipments of property on Government bills of lading, unless by mutual agreement, GSA performs these functions.

(e) When Government bills of lading are used, the weight of the household goods and personal effects of each employee is to be identified for the purpose of applying the maximum weight limitations. (See

section 12.) If no adequate scale is available at point of origin, at any point en route, or at destination, a constructive weight, based on seven pounds per cubic foot of properly loaded van space, may be used. Such constructive weight also may be used for a part load when its weight could not be obtained at origin, en route, or at destination, without first unloading it or other part loads being carried in the same vehicle. When the weight of an employee's household goods and personal effects (as determined under the preceding sentence) exceeds the maximum weight limitation, the total quantity may be shipped on a Government bill of lading but the employee shall reimburse the Government for the cost of transportation and temporary storage of the excess weight, computed from the total charges according to the ratio of excess weight to the total weight of the shipment.

(f) The above procedure for civilian agencies also is applicable to civilian employees of the Department of Defense except that the Department of Defense, rather than the General Services Administration, is responsible for attempting to arrange favorable rates with respect to mass movements of its employees.

2. Title X, section 34(a)(2), is amended as follows:

The phrase "section 15 of title II" is changed to "section 13(g) of title II."

3. Schedule A is amended as follows:

(a) Section 1, Table 3, first paragraph, is amended by changing "section 12(a)" to "section 13(d)."

(b) Section 2, first paragraph, is amended by changing "section 12(b)" to "section 13(e)."

[fol. 74] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

[Title omitted]

PLAINTIFF'S MORE DEFINITE STATEMENT OF THE ISSUE INVOLVED—filed May 17, 1961

Comes now the plaintiff, United States of America, and in accordance with the Court's order of May 5, 1961, directing that the plaintiff "specify the type of transportation concerning which it charges the defendant is seeking to exercise jurisdiction", respectfully shows:

1. This action was filed on March 9, 1961, and in the complaint it was the purpose of the plaintiff to allege that the Commission asserted the power to regulate the rates for all shipments of property by the United States, including not only the property owned by the United States but likewise the household goods and personal effects of personnel of the United States. At the time the complaint was drawn the only general order or directive of the Commission of which the plaintiff had knowledge dealing with its power over such rates was a directive addressed to All Class A and Class B Motor Carriers of property dated March 11, 1954. This directive was by its terms based on a letter of the Attorney General of Georgia to an official of the Commission dated March 8, 1954. Copies of these documents are attached as [fol. 75] Exhibits A and B. It will be noted that in this general order or directive the Commission clearly and positively asserts that it has the power to regulate the rates for the shipment of all property by the United States including property owned by it. To the plaintiff's best knowledge and belief this general directive of the Commission has never been revoked or modified in any way by a general order or directive of the same dignity. However, on May 4, 1961, attorneys for the plaintiff were given a letter written by the Attorney General of Georgia

to the Commission on May 29, 1958, in which the Attorney General advised the Commission that under the decision of the Supreme Court in *California Commission* v. *United States*, 355 U. S. 534 (decided March 3, 1958), the Commission no longer had the power to regulate the rates for the shipment of property owned by the United States for the account of the United States Armed Forces. In this letter the Attorney General stated that the question whether or not the Commission had the power to regulate the rates for the transportation of private property of individuals employed by the Armed Forces was an open one. A copy of this letter is attached as Exhibit C. A short time after May 4, 1961, the attorneys for the United States came into possession of a letter written by the Director, Transportation Rates Division of the Commission, to Shippers Express, Inc., of Atlanta, on August 5, 1958. In this letter it was stated that the Commission no longer had the power to regulate the rates for the shipment of property owned by the United States. A copy of this letter is attached as Exhibit D. Since this action was commenced it appears that officials of the Commission have stated to the public press, and the counsel of the Commission has stated in open court, that the Commission no longer asserts the power to regulate the rates for the shipment of property owned by the United States but simply asserts the power to regulate the rates for the shipment of household goods and personal effects of personnel of the United States. In reli- [fol. 76] ance on the letters and statements above mentioned the United States accepts as a fact that the Commission no longer asserts the power to regulate the rates for shipment of property owned by the United States, and does not now and will not in the future attempt to regulate such rates. Therefore the sole issue before the Court may be stated as follows:

ISSUE: Are the pertinent sections of the Georgia statute unconstitutional insofar as they confer upon the Public Service Commission of Georgia the power to regulate the rates in contracts entered into by the United States with carriers in Georgia for the carriage of the household goods and personal effects of personnel of the

United States when the contract is the contract of the United States and the United States assumes the sole responsibility of paying the carrier for the carriage by the terms of the contract?

/s/ Charles D. Read, Jr.
United States Attorney

/s/ E. Riggs McConnell
Attorney, Department of Justice
Washington 25, D. C.

CERTIFICATE OF SERVICE
(omitted in printing)

[fol. 77] EXHIBIT A TO PLAINTIFF'S MOBL
DEFINITE STATEMENT, ETC.

GEORGIA PUBLIC SERVICE COMMISSION
Atlanta

March 11, 1954

TO ALL CLASS "A" AND CLASS "B" MOTOR CARRIERS OF PROPERTY:

For some time the Georgia Public Service Commission has been experiencing difficulty with the regulation of charges made by motor common carriers for the transportation of property for account of various agencies of the United States Government. Many reports have been made to us concerning the procedure whereby the Government requests bids on given movements and the carriers quote substantially reduced transportation charges which bear little or no relation to the rates charged the general public.

It has been contended by some of the motor carriers and by transportation officials of some of the Government agencies that this Commission has no jurisdiction over the rates, charges and services of motor carriers performing for-hire transportation for the United States Government when such transportation is over federally—aided highways. The basis for this contention is a decision of the Comptroller General of the United States handed down in November, 1935, in a proceeding involving a particular situation in the State of Arizona.

In order that this Commission might be properly advised as to its jurisdiction over this type of transportation, we requested the Attorney General of the State of Georgia to render a formal opinion as to the effect of this Arizona ruling on the regulatory powers of this Commission. We have now received the opinion of the Attorney General, a copy of which is attached hereto for your information.

It will be noted that, in the opinion of the Attorney General of the State of Georgia, the Georgia Public Service Commission has *complete* authority over intrastate motor carrier transportation for account of the United

States Government so long as that transportation is performed by other than Government-owned carriers.

Accordingly, this is to advise that all motor carriers certificated by the Georgia Public Service Commission to transport property between points in the State of Georgia will be required to charge for such transportation the rates and charges approved or prescribed by this Commission regardless of the company or agency for which the transportation is performed. Carriers found violating this provision will have issued against them a Rule [fol. 78] Nisi to show cause why their Certificates of Public Convenience and Necessity should not be cancelled for failure to comply with the rules of this Commission.

MATT L. McWHORTER
Chairman

Copy to:

All Interested Parties

[fol. 79] EXHIBIT 3 TO PLAINTIFF'S MORE DEFINITE STATEMENT, ETC.

THE DEPARTMENT OF LAW
STATE OF GEORGIA
Atlanta

March 8, 1954

Mr. Dave O. Benson, Director
Transportation Rates Division
Georgia Public Service Commission
Atlanta National Building
Atlanta, Georgia

Dear Mr. Benson:

I duly received your letter of February 24 and the request of yourself and Chairman McWhorter of the Georgia Public Service Commission for a formal interpretation of the effect of the ruling of the Comptroller General of the United States, contained in Volume 15, Page 427 of the Decisions of the Comptroller General of the United States, on the jurisdiction of the Georgia Public Service Commission over the rates, charges and services of motor carriers performing for hire transportation service for the United States Government between points within the State of Georgia.

The opinion of the Comptroller General rendered in November, 1935; is to the effect that a State may not by the imposition of licenses on truck lines interfere with the right of the United States to operate over the public roads either by means of a Government truck or a contractor engaged by the Government for the exclusive purpose of transporting Federal supplies, and a contractor may not be excused from performance on the grounds that the State Commission has refused to grant him a license.

It was therein stated that the United States has a right to transport its supplies over the public roads in Arizona and particularly over the roads which the Federal Government assisted in constructing, either by means of a Gov

ernment-owned truck or by the employment of such trucking concern as may be satisfactory to the United States. The State of Arizona may not interfere therewith by denying to the United States the right to operate over the public roads by means of a Government truck or a contractor engaged by the Government for the exclusive purpose of transporting Federal supplies.

In the opinion of the Comptroller General, there was cited the case of *Johnson* v. *State of Ohio*, 254 U.S. 251, and the case of *Western Union Telegraph Company* v. *Pendleton*, 122 U.S. 347.

[fol. 80] In the Johnson case, it was held that a law of a State penalizing those who operate motor trucks on highways without having obtained licenses based on examinations of competency and payment of a fee, cannot constitutionally apply to an employee of the Post Office Department while engaged in driving a Government motor truck over a post road in the performance of his official duty. (Citing *Ohio* v. *Thomas*, 173 U.S. 276, 283)

In the case of *Ohio* v. *Thomas*, 173 U.S. 276-283, it was held that the police power of the State does not extend to the United States, its property or transactions and that Federal property and transactions are immune from State regulations and conflicting State statutes are invalid under the Supremacy Clause of the Constitution of the United States.

The Supremacy Clause of the Constitution of the United States, same being Article 6, Clause 2, provides: "This Constitution and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

Clearly, the opinion of the Comptroller General of the United States is correct insofar as the immunity of the Federal Government is concerned. However, there is con-

siderable doubt as to whether that part of the opinion relating to contractors transporting Government goods under contracts with the Government is correct. The Supreme Court opinions cited by the Comptroller General do not support this conclusion. I do not locate any Georgia decisions which deal specifically with this point. There was a subsequent opinion of the Supreme Court of the United States, that of *Pennsylvania Dairies* v. *Milk Control Board*, 318 U.S. 261, that supports the view that the immunity under the Supremacy Clause would not be extended to those furnishing supplies to the Government.

It would be our opinion that the Georgia Public Service Commission would have complete authority over contractors performing services for the Government, that is to regulate their rates, charges, services, etc., but that they would have no authority over Government-owned carriers engaged in work for the United States Government.

[fol. 81] We trust that this satisfactorily answers your inquiry, but if further information is desired, we will be glad to furnish same upon request.

Very truly yours,

/s/

EUGENE COOK,
Attorney General, State of Georgia

/s/

DUDLEY COOK,
Deputy Assistant Attorney General
for Georgia Public Service
Commission.

[fol. 82] EXHIBIT C TO PLAINTIFF'S MORE DEFINITE STATEMENT, ETC.

May 29, 1958

Honorable Matt L. McWhorter, Chairman
Georgia Public Service Commission
244 Washington Street, S. W.
Atlanta, Georgia

Re: *Public Utilities Commission* v. *United States*, 2L. Ed. 2d 470.

Dear Mr. McWhorter:

I am pleased to acknowledge your request as to whether the decision of the Supreme Court of the United States in the above captioned case eliminates from the jurisdiction of your Commission regulation of Georgia intrastate transportation rates of the railroads and common and contract motor carriers on movements for account of the United States Government and its various departments and agencies.

On March 3, 1958, the Court struck down a California statute which required the approval by the state's Public Utilities Commission of rates charged by common carriers for transportation of "property of the Armed Forces". The statute provided that "The commission may permit common carriers to transport property at *reduced rates for the United States* . . . to such extent and subject to such conditions as it may consider just and reasonable." There is a large volume of military traffic in California, and the federal government negotiates special rates with carriers which are substantially equal to or lower than those for regular commercial shipments.

On the merits, the Court found that federal policy, as expressed in statutes and military regulations, provides for federal officers negotiating rates for shipment with discretion to determine when the existing rates will be accepted and when negotiations will be undertaken for lower rates. The California statute would, said the Court,

[fol. 83] permit exercise of this discretion only if the state commission approved, and this amounts to a prohibition on the federal government. "Here the conflict between the federal policy of negotiated rates and the state policy of regulation of negotiated rates seems to us to be clear", the Court declared pointing out that state regulation might involve the Services in "an administrative morass" that would seriously interfere with national defense.

There is some question as to whether this opinion is limited to the transpotration of "property of the Armed Forces". Certainly the decision itself could only be authority as to government owned property. Nevertheless, the dicta of the case could be construed either way with respect to contracts negotiated by the federal government for the transportation of private property of individuals employed by the Armed Forces. For example the opinion itself uses the words "government property" or "United States property" in three separate places. It makes no reference to property other than government owned property. However, in reference to the statement concerning conflict between federal policy of negotiated rates and state regulation, the opinion could be construed to cover any federal negotiated rate including contracts by the federal government for the transportation of private property of individuals employed by the Armed Forces.

One basis of the California case, the possible "administrative morass", does not exist in the State of Georgia. There was no provision in the California Code or the regulations for the making of a "freight of all kinds" rate which is the practice of the federal government, i.e., unless the government could negotiate rates for each shipment, the shipments would be delayed for commission action unless shipped under the established rates. It is my understanding that your Commission permits a "freight of all kinds" rate; therefore, no so-called "administrative morass" would result from the exercise of your Commission's jurisdiction.

In conclusion, I am of the opinion that the decision in *Public Utilities Commission* v. *United States*, 2 L. Ed. 2d 470 (March 3, 1958), eliminates from the jurisdiction of your Commission regulation of Georgia intrastate [fol. 84] transportation rates of the railroads and common and contract motor carriers on movements of government owned property for account of the United States Armed Forces. As to contracts negotiated by the federal government for the transportation of private property of individuals employed by the Armed Forces, the question remains unanswered, and I am unable to give an opinion as to just what would be the ruling of the Supreme Court of the United States.

With kindest regards and best wishes, I am

Sincerely yours,

EUGENE COOK
Attorney General

E C i n b Mall

[fol. 85] EXHIBIT D TO PLAINTIFF'S MORE DEFINITE STATEMENT, ETC.

GEORGIA PUBLIC SERVICE COMMISSION
244 Washington Street, S. W.
Atlanta 3, Georgia

August 5, 1958

File 6-566
TD-3051

Shippers Express, Inc.
5 Haynes Street, S. W.
Atlanta, Georgia

Gentlemen:

This will acknowledge receipt of copy of Shippers Express, Inc. Tender No. Atla.MX-2 of July 21, 1958 quoting to the Department of Defense rate of 47 cents per 100 pounds, minimum weight 20,000 pounds (with excess over such minimum to be transported at 39 cents per 100 pounds) applicable on shipments of machinery, NOIBN and aircraft engines between Warner Robins and 15 miles thereof on the one hand, and Atlanta and 15 miles thereof on the other hand.

This Commission has been advised by ruling from the Attorney General of the State of Georgia that the recent decision of the United States Supreme Court in the California case (Public Utilities Commission v. United States, 2 L. Ed. 2nd 470) has removed the jurisdiction of this Commission over *rates* charged for the transportation of property owned by the United States Government moving for account of the United States Government.

Accordingly, this Commission will no longer specifically approve or reject any rate tender made to the United States Government for the transportation of property owned by the United States Government. Your Rate

Tender No. Atla. MX-2 is being placed in the Commission's file as information only.

Very truly yours,

/s/ David O. Benson, Director
Transportation Rates Division

DOB:em

CC:

Mr. W. A. Green, Manager, Rates Division, Georgia Motor Trucking Association, Inc., 328 Ponce de Leon Avenue, N. E., Atlanta 8, Ga.

Mr. R. E. Boyle, Jr., Chairman, Southern Freight Association, 101 Marietta Street, Atlanta 3, Georgia

Please advise the members of your Associations of this change in requirements as to Section 22 Type Quotations on Georgia intrastate traffic. No approval by the Commission will be required as to the level of the rates quoted in future such tenders, but copy of all such tenders submitted will be placed in the Commission's files as information to all concerned.

D.O.B.

CC:

All Interested Parties

[fol. 86] [File endorsement omitted]

IN THE
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

[Title omitted]

ANSWER OF THE DEFENDANT, GEORGIA PUBLIC SERVICE COMMISSION—filed May 31, 1961

Now comes the GEORGIA PUBLIC SERVICE COMMISSION and answering, says:

FIRST DEFENSE

The complaint of the United States of America fails to state a claim upon which relief may be granted.

SECOND DEFENSE

—1—

The defendant does not contest the jurisdiction of this Court to decide the controversy brought before it by the plaintiff's complaint.

—2—

The allegations of paragraph 2 insofar as they apply to the shipment of the household goods of United States servicemen and civilian personnel by commercial carrier within the State of Georgia are admitted.

—3—

In answer to paragraph 3 of the plaintiff's complaint the defendant for want of information is unable either [fol. 87] to admit or deny that the Federal Government since its creation and the establishment of the Armed Forces of the United States has been in the practice of negotiating with carriers through officers of the United States for the movement of the household goods of military personnel.

Further answering the allegations of paragraph 3 the defendant is further unable to admit or deny that Section 22 of the Interstate Commerce Commission Act constituted an express recognition of such "a long established practice" with regard to individual members of the Armed Forces of the United States.

Further answering paragraph 3 of plaintiff's complaint the defendant for want of information is unable to admit or deny the truth of plaintiff's assertion that it has been "generally assumed" that the officers of the United States are empowered to negotiate rates for the intrastate shipment of the household goods of individual military and civilian personnel of the United States without regard to state statutes regulating the rates charged by carriers for the transportation of such shipments.

Further answering paragraph 3 of plaintiff's complaint, the defendant admits that the Federal Property and Administrative Services Act of 1949, Public Law 152, 81st Congress, 1st Session, Sections 201 and 202, 63 Statutes, at page 377, makes no reference to intrastate shipments of property by the Federal Government as distinguished from such shipments in intrastate commerce and further, that the regulations of the various federal departments and agencies with respect to the negotiation of rates for the carriage of household goods of individual members of the Armed Services of the United States and civilian employees of the United States make no express reference to intrastate shipment of such property as distinguished from the shipment of such property in interstae commerce.

—4—

Answering paragraph 4 of plaintiff's complaint, the Georgia Public Service Commission, asserts that it has [fol. 88] never conceded that the Georgia statutory provisions delegating authority to it to regulate the rates which carriers may charge for the intrastate transportation of property do not extend to the rates charged for the transportation of household goods of military and civilian personnel of the United States in intrastate commerce within the State of Georgia. The Georgia Public

Service Commission ceased asserting authority to regulate the rates charged for the intrastate carriage of property owned by the Federal Government in 1958 after being officially advised by the Attorney General of Georgia by letter dated 29 May, 1958, that it lacked authority to regulate the rates charged by intrastate carriers for shipments of military property of the United States, and asserting that its authority to regulate shipments of federally owned property in general was dubious.

Further answering paragraph 4 of plaintiff's complaint the defendant denies that for many years it did not regulate the rates for shipments by the United States between points within the State.

The defendant admits the other allegations contained in paragraph 4.

—5—

The defendant admits the truth of the allegations of paragraph 5 insofar as it relates to the intrastate shipment within the State of Georgia of the household goods of military and civilian personnel of the United States.

—6—

The defendant denies the allegations of paragraph 6 and alleges that Sections 93-304, 93-310, 93-403, and 93-407, Georgia Code Annotated, and Sections 68-613 and 68-614, Georgia Code Annotated, insofar as they vest authority in the Georgia Public Service Commission to regulate [fol. 89] the rates to be charged for the carriage of the household goods of civilian and military personnel of the Federal Government in intrastate commerce within the State of Georgia are not contrary to the Federal Constitution.

—7—

The defendant admits that there is a real controversy between the United States and itself as to the constitutional authority of the defendant in pursuance of the Georgia statutory provisions above cited to regulate the

rates which may be charged by carriers for the intrastate carriage of the household goods of the United States military and civilian personnel within the State of Georgia.

/s/ Eugene Cook
The Attorney General

/s/ Ariel V. Conlin
Assistant Attorney General

/s/ Sheldon C. Dorough
Deputy Assistant Attorney General

[fol. 90] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

[Title omitted]

CROSS-MOTION FOR SUMMARY JUDGMENT—filed September 6, 1961

Now comes the GEORGIA PUBLIC SERVICE COMMISSION, defendant, and shows that, from the pleadings and affidavits filed in this case, it appears that there is no issue of material fact in this case and that the sole question between the parties is a matter of law.

Now, therefore, on the basis of said pleadings and affidavits already filed in this case, the defendant, Georgia Public Service Commission, moves this Court to enter a summary judgment in its favor pursuant to Rule 56 (a) of the Rules of Civil Procedure.

/s/ Eugene Cook
The Attorney General

/s/ Ariel V. Conlin
Assistant Attorney General

/s/ Sheldon C. Dorough
Deputy Assistant Attorney General

• • • •

[fol. 91] IN
UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

No. 7528 Civil Action

UNITED STATES OF AMERICA, PLAINTIFF

versus

THE GEORGIA PUBLIC SERVICE COMMISSION,
DEFENDANT

OPINION AND JUDGMENT ON MOTION FOR SUMMARY
JUDGMENT—October 2, 1961

The United States sues to prevent the Georgia Public Service Commission from regulating tariffs charged by carriers within the state of Georgia for the intrastate shipment of household goods of government employees under contracts made with the carriers by government agencies.

The state Commission is under the duty to prevent discriminatory rates for intrastate shipments.[1] It conceives it to be its duty to prevent carriers from contracting with military or other federal government agencies to carry household goods of individual employees of the United States, when such shipments are wholly within the state of Georgia, at less than the published tariffs.

No issue is presented touching on the right of the Commission to regulate the rates charged by Georgia carriers for the carriage of strictly governmental property. The Commission concedes that this issue has been foreclosed in favor of the United States by California Public Service Commission v. United States, 355 U. S. 534.

[fol. 92] The United States contends that since the carriage of the household goods of its employees, where

[1] See Georgia Code Ann. §§ 93-309, 93.310 and 93.407, as to railroad transportation. See Georgia Code Ann. §§ 68-613, 68-614 and 68-9909, as to motor carrier transportation.

authorized by law at government expense. In a proper exercise of the constitutional power of the government to engage in the enterprise, it makes no difference whether the carriage is of government property or is of personal property, for the moving of which the government is liable. The policy of the federal government to arrange for carriage services, whether by bid or negotiation, at the cheapest responsible prices, the government says, is the same in either case.

The Georgia Commission seeks to distinguish the facts here from those which resulted in the Supreme Court's adverse decision in the California case, saying that the Court is here dealing with a fact situation that calls for application of the principles laid down by the Supreme Court in the case of Penn Dairies, Inc., et al. v. Milk Control Commission of Pennsylvania, 318 U.S. 261.

The case is not as simple one to resolve. All parties agree that under the supremacy clause of the Federal Constitution the federal government has the power, if it elects to exercise it, to prevent any interference by way of state regulatory schemes upon the proper exercise of activities constitutionally engaged in by the federal government.

> "It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from their own influence." M'Culloch v. Maryland, 4 Wheat. 316, 427.

It is also clear that short of state taxation of the national government or state regulation of the performance of federal officials and agencies of governmental functions, Ohio v. Thomas, 173 U.S. 276; Johnson v. Maryland, 254 U.S. 51; Hunt v. United States, 278 U.S. 96; Arizona v. California, 283 U.S. 423, the states may, in the absence of congressional enactment, adopt nondiscriminatory taxing statutes, and nondiscriminatory regu-
[fol. 93] lations under the state's police power that may to some degree affect either the cost of the government's operation within the state or increase difficulties touching

on such operation, Alabama v. King & Boozer, 314 U.S. 1; United States v. Baltimore & Annapolis RR Co., 308 U.S. 525; Penn Dairies, Inc. et al. v. Milk Control Commission, supra.

The question we have here to decide, therefore, is whether the Georgia laws place a direct prohibition on the agencies of the federal government, or, if not, whether the federal laws authorizing the transportation in question impliedly prohibit inconsistent regulations.

The state's main reliance is on the Penn Dairies case, supra. There, notwithstanding an existing federal statute authorizing the military services to purchase by bid or negotiated contract the articles of food and other supplies needed for the armed services, the Supreme Court held that a contract made by a Pennsylvania dairyman for supplying the military forces in Pennsylvania at prices less than the established price of the Pennsylvania Milk Control Commission, could validly be treated by the Pennsylvania Commission as a basis for revoking the license of the dairy. The Court dealt with the matter in terms of the legality of the regulatory scheme of the Milk Control Commission when in conflict with the federal scheme of authorizing purchases at the lowest available price. The Court said:

> "The dairy's answer to the citation challenged the constitutional authority of the state to regulate prices charged to the United States."

The Court answered this question by saying:

> "Here the state regulation imposes no prohibition on the national government or its officers. They may purchase milk from whom and at what price they will, without incurring any penalty. See the opinion below, 148 Pa. Super. 270 71. As in the case of state taxation of the seller, the government is affected only as the state's regulation may increase the price which the government must pay for milk. By the exercise of control over the seller, the regulation imposes or may impose an increased economic burden on the [fol. 94] government, for it may be assumed that the regulation if enforcible and enforced will increase the

price of the milk purchased for consumption in Pennsylvania, unless the government is able to procure a supply from without the state, see Baldwin v. Seelig, 294 U.S. 511. But in this burden, if Congress has not acted to forbid it, we can find no different or greater impairment of federal authority than in the tax on sales to a government contractor sustained in Alabama v. King & Boozer, supra; or the state regulation of the operations of a trucking company in performing its contract with the government to transport workers employed on a Public Works Administration project, upheld in Baltimore & Annapolis R. Co. v. Lichtenberg, supra; or the local building regulations applied to a contractor engaged in constructing a postoffice building for the government, sustained in Stewart & Co. v. Sadrakula, 309 U.S. 94, 318 U.S. 261, 270.

The record discloses that many state Public Service Commissions assumed from the language and decision of the Penn Dairies case that they were thus free to regulate the rates to be charged the government uniformly with those to be charged with other shippers for intrastate shipments of government property. The attitude on the part of the California Public Service Commission produced California Public Service Commission v. United States, 355 U.S. 534. The California statute, in effect, provided that its Commission should make uniform rates and see to their application without discrimination. It had a special provision, however, favorable to the United States. It provided that upon application by the United States the Commission had the power to authorize variations from the approved tariffs. Objecting to the necessity of applying in each case for the privilege of negotiating a freight rate for the carriage of the many military shipments within the state, the United States brought a suit before a statutory three-judge court in California to enjoin the interference by the Commission with the government's negotiation of rates with carriers as might be agreed upon. All of the evidence dealt with in that case touched upon the transportation of government property. Much of the evidence demonstrated the need for unfet-

tered handling of many of the important and some secret cargoes needed by the military forces.

[fol. 95] The federal statutes which established the policy of the United States (10 U.S.C.A. § 2301-2314) as implemented by regulations were stated by the Supreme Court to "sanction the policy of negotiating rates for shipment of federal property and entrust the procurement officers with the discretion to determine when existing rates will be accepted and when negotiation for lower rates will be undertaken." 355 U.S. 534, 543. The Court then said:

> "It also seems clear that under Section 530 of the California Public Utilities Code this discretion of the federal officers may be exercised and reduced rates used only if the Commission approves. The question is whether California may impose this restraint or control on federal transportation procurement."

The Court answered this question in the negative, and distinguished Penn Dairies on the ground that:

> "There the question, much mooted, was whether the federal policy conflicted with the state policy fixing the price of milk which the United States purchased. The Court concluded that the state regulation 'imposes no prohibition on the national government or its officers.' Id. at 270. Here, however, the state places a prohibition on the federal government. Here the conflict between the federal policy of negotiated rates and the state policy of regulation of negotiated rates seems to us to be clear."

Our task then is twofold. First, we must determine the factual basis for the distinction drawn in the California case between that case and Penn Dairies. Second, we must decide which of these two cases more closely parallels the one before us for decision.

The state of Georgia argues that the procedural plan of the California law which put the burden on the United States to apply for special treatment was a distinguishing feature, since it is apparent that under the Pennsylvania law there was an absolute prohibition against the sale

of milk at less than the established price and the United States was not named or in any way singled out. The state contends that when the Supreme Court, in the California case, called attention to the fact that the Pennsylvania regulation "imposes no prohibition on the national [fol. 96] government or its officers" it sought to point out this procedural matter, since the California law did impose on the national government the need to apply for an exemption if it wanted one. This, it seems to us, is clearly untenable. Certainly there is less of a prohibition on the national government where the state says it may negotiate contracts if its requests and obtains permission to do so, than where a state, like Pennsylvania and like Georgia, flatly says it may not negotiate at all.

In the California case, the Court noted that:

> "... the Public Utilities Code provides penalties for violations of its provisions and orders issued thereunder. 2107, 2112. These penalties are applicable not only to the carrier but to shippers as well. California Public Utilities Code, 2112. As stated by the District Court: 'If a United States officer were to negotiate with a carrier for "reduced rates" without permitting the defendant to determine whether it "considered" the conditions of the contract "just and reasonable", he could be thrown into the county jail.' 141 F. Supp. at 186."

In Penn Dairies, on the other hand, the Court expressly stated that, "Here the state regulation imposes no prohibition on the national government or its officers. They may purchase milk from whom and at what price they will, without incurring any penalty." 318 U.S. at 270. The basis for this statement completely escapes us. An examination of the Pennsylvania Milk Control Act reveals that penalties can be imposed on "any person" who "buys or receives" or "offers to buy or receive" milk at other than the approved prices. (31 Pa. Stat. 700j-807).

In view of the fact that both the California law and the Pennsylvania law expressly provided sanctions against shippers who negotiated contracts other than as provided for by the regulatory agency, we are just not able to

conclude that the Supreme Court, in the California case, found any distinguishing characteristic here. Moreover, the Courts which have followed the California case in striking down state regulatory legislation in the field of transportation have not even mentioned the penalty issue in reaching their decisions. See Hughes Transportation, [fol. 97] Inc. v. United States (Court of Claims 1958), 168 F. Supp. 219, cert. den., (1959); 359 U.S. 968 [Kentucky Statute]; Union Transfer Co. v. United States (Court of Claims 1958), 168 F. Supp. 217, cert. den., (1959) [Nebraska Statute]; United States v. Pennsylvania Public Utility Commission, (1958), 393 Pa. 143 A. (2d) 341, cert. den., (1958), 358 U.S. 884 [Pennsylvania Statute]; Railroad Commission of Texas v. United States (Tex. Sup. Ct. 1958), 317 S.W. 2d 927, [Texas Statute]; United States v. Pentecost, Chairman Tennessee Public Service Commission, rule 7844 Chancery part 2, Nashville, Tennessee [Tennessee Statute]. See also Benton Rapid Express, Inc. v. United States (Ct. Cl. 1959) 171 F. Supp. 868, 872 [Georgia Statute]; Alabama Highway Express, Inc. v. United States, (Ct. Cl. 1959), 175 F. Supp. 143, 146 [Alabama Statute]; United States of America v. Carter, et al, 121 So. 2d 437.

In light of the foregoing analysis, we cannot say that the provisions for penalties in the Georgia statutes (Ga. Code Ann. § 68-9909) compels us to follow the California case here.

Finally, the state comments on the distinction between the need for the right to negotiate for the shipment of strictly military goods (the issue in the California case) and the need for the right to negotiate for the purchase of milk (the issue in Penn Dairies) or the shipment of household goods (the issue in the instant case). Since there are no other significant factual distinctions between California and Penn Dairies, we can only conclude that the difference in the character of the commodities dealt with was the element which the Supreme Court thought justified its departure in the California case from the rule previously followed in Penn Dairies. The following language from the opinion in the California case is revealing:

"The seriousness of the impact of California's regulation on the action of federal procurement officials is dramatically shown by this record.

"It is the practice of the Government not only to negotiate separate rates which vary from the class or 'paper rate' but also to negotiate a 'freight all [fol. 98] kinds' rate which will cover hundreds of diverse items for the supply of a division of the Army or for a vessel that are needed at one place at one particular time. There is no provision in the California Code or the regulations for the making of such shipments. The findings are that if the Code is applied here, this type of arrangement would be abol[illegible]:

> 'This would make it necessary for the shipping officers to classify the hundreds and thousands of different items used in military operations, to segregate such items in accordance with published tariffs and classifications, to rearrange the boxing and crating of such items in order to meet the classifications and requirements of commercial traffic and fill out voluminous documents. This additional process could cause delays as high as thirteen hours in the shipment of one truckload or carload. In many situations a delay of this sort would seriously hamper or disrupt the military mission for which the shipment was made.'

"Moreover, no rates exist for much of the military traffic, which means that, unless the United States can negotiate rates for each shipment, the shipments will be delayed for Commission action unless shipped under the established rates which are higher than negotiated rates.

"General Edmond C. R. Lasher of the United States Army, who was Assistant Chief of Transportation, testified at the trial:

> 'for us to make these arrangements at the Washington level with the various states, let us say 48 states, with 48 varieties of methods to follow, we would find ourselves in an administrative

> morass out of which we would never fight our way, we would never win the war.'"

355 U.S. 534, 545, 546.

See also the discussion as to the significance of the military character of the carriage in the dissenting opinion, pages 550 and 551.

Since the shipment of household goods by the United States does not present the unique and difficult problems encountered when military supplies are involved, it appears that the case before us has more in common with Penn Dairies than with California Commission v. United States. This being so, we must conclude that Penn Dairies controls our determination of the issue here.

We do not overlook the fact that our conclusion is at odds with that taken by the Supreme Court of Florida [fol. 99] in United States v. Carter, et al, supra, the only litigated case actually deciding the precise issue involved here and with the practice followed by a number of state regulatory commissions which have interpreted the California decision as barring state interference with the negotiation of rates for the shipment of household goods by the United States. Since, however, the Supreme Court, in the California case, did not overrule Penn Dairies but was at pains to distinguish it, there remains the necessity for us to determine which of these cases governs the issue here presented. We have, therefore, examined the cases carefully, and have decided that Georgia's attempt to regulate the rates at which the United States may ship household goods of its military and civilian personnel presents the same issue as was presented by Pennsylvania's attempt to set the price at which the United States could purchase milk for its military personnel. Assuming that the Penn Dairies case still stands as a precent, as we must, we are compelled to conclude that the Georgia Public Service Commission can legally do what the Georgia statute says it can do. If our assumption of the continuing vitality of Penn Dairies is incorrect it must remain for the Supreme Court to say so.

It follows that judgment is entered for the defendants on their motion for summary judgment.

This 2nd day of October, 1961.

/s/ Elbert P. Tuttle
United States Circuit Judge

/s/ Frank A. Hooper
United States District Judge

/s/ Boyd Sloan
United States District Judge

FILED October 2, 1961

[fol. 100] [File endorsement omitted]

• • • •

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—filed November 30, 1961

I. Notice is hereby given that the plaintiff, United States of America, hereby appeals to the Supreme Court of the United States from the judgment entered in this action on October 2, 1961 granting defendant's motion for summary judgment.

This appeal is taken pursuant to 28 U.S.C. 1253 and 2101(b).

II. The clerk will please prepare a transcript of the record in this case, for transmission to the Clerk of the Supreme Court of the United States and include in such transcript the entire District Court record in this case.

III. The following question is presented by this appeal:

Whether, where the United States is liable for the cost of moving the household goods of its civilian or military personnel or their dependents, the State of Georgia may prohibit special arrangements between the United States and common carriers for the movement of such goods between points within the state at rates below those prescribed by the Georgia Public Service Commission.

/s/ Charles L. Goodson
United States Attorney
Northern District of Georgia

/s/ Irwin A. Seibel
Attorney, Department of Justice
Counsel for Plaintiff

[fol. 101] ACKNOWLEDGMENT OF SERVICE
(omitted in printing)

[fol. 102] Clerk's Certificate to foregoing transcript omitted in printing

[fol. 103] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

[Title omitted]

Civil Action No. 7528

MOTION FOR EXTENSION OF TIME FOR DOCKETING CASE ON APPEAL TO THE SUPREME COURT OF THE UNITED STATES AND ORDER ALLOWING—filed January 19, 1962

The United States respectfully moves for an extension of time of 30 days, i.e., to February 28, 1962, within which to docket the above case on appeal in the Supreme Court of the United States. This Court entered judgment in the above case on October 2, 1961. The United States, on November 30, 1961, filed a notice of appeal from said judgment to the Supreme Court. The time for docketing the instant case, unless extended, will expire on January 29, 1962.

Various governmental agencies are involved in this litigation and an extension of time is necessary in order for the United States to coordinate their respective positions and prepare and print a jurisdictional statement. Appellee, Georgia Public Service Commission, has authorized us to state that it agrees to the requested extension.

It is therefore requested that this Court enter an order granting an extension of time of 30 days, until February 28, 1962, for the docketing of the above captioned case in the Supreme Court of the United States.

/s/ Richard A. Solomon, Chief
Appellate Section
Antitrust Division

/s/ George R. Kucik
Attorney
Department of Justice

[File endorsement omitted]

[fol. 104] ORDER

Upon motion of the United States in the above captioned case it is hereby ordered that the time for docketing this case on appeal in the Supreme Court of the United States shall be extended for a period of 30 days, until February 28, 1962.

/s/ Elbert P. Tuttle
United States Circuit Judge

Dated: January , 1962

[fol. 105] CERTIFICATE OF SERVICE
(omitted in printing)

[fol. 106] [File endorsement omitted]

IN UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

[Title omitted]

Civil Action No. 7528

MOTION FOR EXTENSION OF TIME FOR DOCKETING CASE ON APPEAL TO THE SUPREME COURT OF THE UNITED STATES AND ORDER ALLOWING—February 23, 1962

The United States respectfully moves for a further extension of time of 15 days, i.e., to March 15, 1962, within which to docket the above case on appeal in the Supreme Court of the United States. This Court entered

judgment in the above case on October 2, 1961. The United States, on November 30, 1962, filed a notice of appeal from said judgment to the Supreme Court. By an order entered in this Court on January 19, 1962, the time for docketing the case on appeal was extended to February 28, 1962, and unless extended further, will expire on that date.

To effectively present this case to the Supreme Court, counsel for the United States must coordinate the positions of the various governmental agencies involved. However, because the United States is now pressed by other pending business in the Supreme Court, the additional time requested is necessary in order to achieve this coordination and prepare and print a jurisdictional statement. The Georgia Public Service Commission, appellee, has authorized us to state that it consents to the requested extension.

[fol. 107] It is therefore requested that this Court enter an order granting an extension of time of 15 days, until March 15, 1962, for the docketing of the above captioned case in the Supreme Court of the United States.

RICHARD A. SOLOMON, Chief
Appellate Section
Antitrust Division
GEORGE R. KUCIK
Attorney
Department of Justice

CERTIFICATE OF SERVICE
(omitted in printing)

[fol. 108] ORDER—February 23, 1962

Upon motion of the United States in the above captioned case it is hereby ordered that the time for docketing this case on appeal in the Supreme Court of the United States shall be extended for a period of 15 days, until March 15, 1962.

United States District Judge

Dated: February 23, 1962

[fol. 109]

SUPREME COURT OF THE UNITED STATES

No. 794, October Term, 1961

UNITED STATES, APPELLANT

vs.

GEORGIA PUBLIC SERVICE COMMISSION

APPEAL from the United States District Court for the Northern District of Georgia.

ORDER POSTPONING JURISDICTION—May 21, 1962

The statement of jurisdiction in this case having been submitted and considered by the Court, further consideration of the question of jurisdiction is postponed until a hearing of the case on the merits. Counsel are requested to brief and argue, in addition to the merits, the question of this Court's jurisdiction on direct appeal under 28 U.S.C. § 1253; see 28 U.S.C. § 2281; cf. Kesler v. Department of Public Safety, 369 U.S. 153, 155-158. The case is set for argument immediately following No. 239.

Mr. Justice Frankfurter took no part in the consideration or decision of this case.

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In the Supreme Court of the United States

OCTOBER TERM, 1961

No. ——

UNITED STATES OF AMERICA, APPELLANT

v.

GEORGIA PUBLIC SERVICE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (R. 91–99) is reported at 197 F. Supp. 793. It is reprinted in Appendix A, *infra*, pp. 20–30.

JURISDICTION

The judgment of the district court, embodied in its opinion, was entered on October 2, 1961 (R. 99), and a notice of appeal was filed by the United States on November 30, 1961 (R. 100). The jurisdiction of this Court rests upon 28 U.S.C. 1253 and 2101(b). *Florida Lime and Avocado Growers, Inc.* v. *Jacobsen*, 362 U.S. 73; *Public Utilities Commission of Cali-*

fornia v. *United States*, 355 U.S. 534; *Public Utilities Commission of Ohio* v. *United Fuel Gas Co.*, 317 U.S. 456.

QUESTION PRESENTED

Whether the district court erred in holding that the State of Georgia could constitutionally prohibit motor common carriers from contracting with the United States, for the intrastate transportation of household goods and personal effects of military and civilian personnel of the United States, at rates other than those prescribed by the Georgia Public Service Commission.

STATUTES AND REGULATIONS INVOLVED

Georgia Statutes. Sections 613, 614 and 9911 of the Georgia Motor Vehicle Code, Ga. Code Ann. 68–613, 68–614 and 68–9911, provide in pertinent part:

> 68–613. *Commission's powers over rates.*— The Commission shall prescribe just and reasonable rates, fares, and charges for transportation by motor common carriers of passengers, baggage and property, and for all services rendered by motor common carriers in connection therewith, * * *.
>
> 68–614. *No discrimination in rates, service, etc.*—No motor common carrier shall charge, demand, collect or receive a greater or less or different compensation for the transportation of passengers and property or for any service rendered in connection therewith than the rates, fares and charges prescribed or approved by order of the Commission; * * *.
>
> 68–9911. *Motor common carrier regulations, violation of.*—Every officer, agent, or employee

> of any corporation and every person who violates or fails to comply with the provisions of Chapter 68–6 relating to the regulation of motor common carriers, or any order, rule, or regulation of the Public Service Commission, or who procures, aids, or abets therein, shall be guilty of a misdemeanor.

Section 2506 of the Georgia Criminal Code (as amended, 1957), Ga. Code Ann. 27–2506, provides in pertinent part that misdemeanors are punishable by "a fine not to exceed $1,000, confinement in the county or other jail not to exceed six months," and forced labor "on the public works * * * not to exceed 12 months, any one or more of these * * *."

Federal Statutes and Regulations. Pertinent sections from the Public Contracts Procurement provisions, 63 Stat. 393, as amended, 41 U.S.C. 251–60; the Armed Services Procurement provisions, 70A Stat. 127, 10 U.S.C. 2301–14; the Armed Services Pay and Allowances provisions, 63 Stat. 813, as amended, 37 U.S.C. 253(c); the Administrative Expenses Act of 1946, 60 Stat. 806, as amended, 5 U.S.C. 73b–1; the Administrative Services Act of 1949, 63 Stat. 383, 40 U.S.C. 481; and relevant portions of General Services Administration, Department of Defense, and other federal regulations are set forth in Appendix B, *infra*, pp. 31–40.

STATEMENT

This is an appeal from a judgment of a three-judge district court for the Northern District of Georgia granting summary judgment against the United States in an action it had brought to restrain the Georgia

Public Service Commission from preventing, pursuant to statutes of the State of Georgia, rail and motor carriers from contracting with military or civilian agencies of the federal government for transportation within Georgia of household goods at rates other than those prescribed by the Commission. The government contended that the state regulatory system directly conflicted with governing federal transportation policies, in violation of the Supremacy Clause, Art. VI, cl. 2, of the Federal Constitution. The district court held, however, that the state regulations were not in conflict with any federal policy; that they merely imposed a non-discriminatory economic burden on the federal government and were therefore constitutional. The relevant facts, which are not in dispute, are as follows:

1. For many years the United States has negotiated special rate agreements with carriers for the shipment of property that it owns or is under obligation to transport (R. 2, 9, 39). This practice has been expressly recognized by the Congress in statutes authorizing the proper United States military and civilian officials to negotiate transportation rates for commodities shipped by the government (R. 3). See 41 U.S.C. 251–60; 10 U.S.C. 2301–14, *infra*, pp. 32–33. No distinction is made in this legislation or the regulations promulgated thereunder between interstate and intrastate shipments (R. 3, 40–41, 52, 87; see R. 42–48, 49–52, 54–73).[1]

[1] Transportation for the United States of goods moving in interstate commerce is specifically exempted from the rate regulations of the Interstate Commerce Act, 49 U.S.C. 22.

Household goods of military and civilian personnel of the federal government and their dependents constitute a significant part of the property transported under these special rate agreements. The assumption by the government of the expense for such transportation is expressly required by law. See 5 U.S.C. 73b–1; 37 U.S.C. 253(c), *infra*, p. 31. Where the transportation of such goods is between two government establishments, military or civilian, it is generally handled for the individuals concerned by transportation officers who make "all the arrangements with the carrier for the crating, packing, pickup, line haul and delivery of the property * * * [which] is shipped on a government bill of lading * * * [with] [t]he carrier * * * paid by a United States disbursing officer with a government check" (R. 39 (military); see R. 13–15, 49–52 (similar General Services Administration procedure for transferring household goods of civilian personnel)).

Within the State of Georgia there are approximately twenty-five military installations and a number of civil establishments (R. 2, 9). In 1960, moving among these installations, there were about "1,100 Georgia intrastate van carrier shipments" of "household goods" of members of the armed services alone (R. 10). These shipments weighed approximately four million pounds and cost the government about $175,000 (*ibid.*).[2] In addition, the cost of shipping

[2] Throughout the nation, approximately 100 million dollars per year is spent by the United States to transport the household effects of civilian and military personnel of the Department of Defense (R. 40).

within the State of Georgia household goods of personnel of civilian governmental agencies was substantial (R. 2).

2. On July 15, 1960, the United States Department of Health, Communicable Disease Center of Atlanta, Georgia, requested George D. Krueger, GSA Region IV Director, Transportation and Public Utilities Service, "to negotiate with carriers for the establishment of economical rates and charges to cover a mass movement of household goods and personal effects of Communicable Disease Center employees on transfer from Savannah to Atlanta, Georgia and vicinity" (R. 13). Krueger thereupon issued an invitation to fifty-four qualified Georgia carriers for bids (R. 13–14). In response, thirteen carriers submitted sealed bids; eight quoted rates and charges as published in Georgia Household Goods Tariff No. 1–B, MF No. 3; the remaining five carriers quoted rates different from those published in that tariff (R. 14, 17).

Upon an evaluation of all bids, the carriage contract was awarded to "the lowest responsive bidder," Consolidated Van and Storage Companies, Inc. ("Consolidated")—one of the five carriers submitting a bid on a basis other than that prescribed by the Commission's tariff (R. 14).[3] Several of the unsuc-

[3] Consolidated deviated from the tariff by quoting, in direct response to the GSA invitation for bids, a single per-hundred-pound rate for shipping and packing a mass shipment (R. 14). GSA had called for bids on a per-hundred-pound basis "to cover a mass movement of household goods and personal effects * * * on transfer from Savannah to Atlanta, Georgia * * *" (R. 13). The Georgia tariff did not permit quotation of a mass-shipment rate for transport of household goods of more than one family.

cessful bidders complained to the Commission that Consolidated had quoted other than approved rates; the Commission thereupon warned all five carriers whose bids deviated from the tariff that, if they performed at the rates quoted to GSA, the Commission would revoke their operating permits for violating its rules (*ibid.*). As a result of this threat, Consolidated, on August 23, 1960, notified GSA that it was defaulting on the contract (R. 14, 20). Unable to obtain carriage at other than rates approved by the Commission, GSA was forced to transport the approximately 43,676 pound shipment at the prescribed rates at an increase in cost of about 66⅔ percent over the charges originally quoted by Consolidated (see R. 28).

Notwithstanding the fact that Consolidated refused to perform its contract with GSA, the Commission, on September 26, 1960, issued a rule *nisi* looking towards revocation of Consolidated's certificate (R. 5, 19). An attorney for GSA, as a representative of the United States, appeared at the hearing and petitioned the Commission to allow the United States "to intervene in the proceeding and present evidence" as to the question whether the Commission had jurisdiction "to regulate the rates for shipments by the United States between points in Georgia" (R. 5). This petition was denied (*ibid.*). Moreover, the Commission refused to allow Krueger, the GSA official re-

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Instead, it required carriers to quote a schedule of approved rates with the total charge to be the sum of charges figured individually on the basis of the weight of property shipped and packed for each family (Ga. Household Goods Tariff Bureau Agent, Tariff No. 1-B, GPSC MF-3, Rule 15 at p. 6; see R. 28).

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sponsible for negotiation of the contract, to testify as to the facts and circumstances of the transaction (R. 15).[4]

3. Faced with this situation in which carriers were being threatened with loss of their certificates if they submitted bids to the government for intrastate movement of household goods at rates other than those prescribed by the State Commission, the United States, pursuant to the provisions of 28 U.S.C. 1331, 1345, 2201, 2281 and 2284, filed a complaint in the United States District Court for the Northern District of Georgia on March 9, 1961 (R. 1). This complaint sought the convocation of a three-judge court pursuant to 28 U.S.C. 2284 and asked that court to enter a judgment (1) declaring that the Georgia statutes prohibiting carriers from entering into contracts for the intrastate shipment of property, including household effects, at rates other than those approved by the State Commission to be unconstitutional and void[5] in their application to contracts negotiated by the United States for the shipment of United States property or the household effects of United States personnel, and (2) permanently enjoin-

[4] We are informed that the Georgia Commission has deferred further proceedings in the Consolidated case pending the outcome of the present litigation.

[5] Subsequently, on motion to make the complaint more definite, the United States on May 17, 1961, limited the issue in the case to the "carriage of household goods and personal effects of personnel of the United States when the contract is the contract of the United States and the United States assumes the sole responsibility of paying the carrier for the carriage by the terms of the contract" (R. 76).

ing the Commission from taking any action or issuing any orders interfering with the ability of the United States and the various carriers to negotiate special arrangements with respect to rates for the transportation of such property (R. 7). An interlocutory injunction to prevent the Commission from regulating these rates pending hearing on the merits was issued (R. 33–34).

The complaint set forth the facts referred to above and alleged that "[a]s a result of the actions of the Georgia Public Service Commission as set forth above the carriers in the State of Georgia will not submit competitive bids for the carriage of property for the United States or enter into any contract with the United States for the carriage of property except at rates prescribed by the Commission, and the Commission continues to regulate such rates from day to day" (R. 5). Such activities were asserted to be unconstitutional and void under Article VI, clause 2, of the Federal Constitution (*ibid.*).

On April 28, 1961, the Georgia Public Service Commission moved to dismiss the complaint on the grounds that the cited Georgia statutes "do not in express terms apply to carriers transporting property for the Federal Government nor has the Supreme Court of Georgia ever construed these Code sections as to their applicability to carriers of property for the Federal Government" (R. 25). In its supporting brief the Commission merely reasserted that the state courts of Georgia had not previously construed the cited statutes with respect to whether and to what extent they applied to carriers of property of

the United States within the State of Georgia. It did not contend that the statutes were on their face ambiguous or could or should be interpreted as not applying to the intrastate transportation of goods for the government if such a construction would otherwise be consistent with the federal Constitution. In opposition, the United States pointed out that the construction of the Georgia statutes by the Commission was in accordance with the advice of the Attorney General of the State of Georgia (see R. 79–81, 82–84), that it had never been suggested that there was any question as to the applicability of the statutes to the federal government, except the constitutional one raised in the government's suit, and that under these circumstances dismissal of the action or holding it in abeyance pending reference to the appropriate state courts could only result in delaying resolution of the question to the detriment of the United States (R. 29–30).

On May 8, 1961, the three-judge district court denied the motion to dismiss. It held that "the plaintiff sought to intervene in one proceeding before the defendant touching on this question, and * * * its right to intervene was denied by the defendant, and * * * there is [not] any convenient or prompt or effective means by which the issue here presented can be passed upon by the courts of the State of Georgia, except by the filing of a suit in the Georgia courts by the United States" (R. 35).

The defendant on June 1, 1961, filed an answer admitting with respect to the transportation of household goods all of the material allegations of the com-

plaint except those relating to the procedures normally followed by the United States for handling such goods, which the answer neither admitted nor denied (R. 86–89). Specifically, the Commission's answer admitted the allegations that, as a result of the actions of the Commission, carriers licensed in the State of Georgia would not submit competitive bids except at rates prescribed by the Commission (R. 88). The Commission also admitted "that there is a real controversy between the United States and itself as to the constitutional authority of the defendant in pursuance of the Georgia statutory provisions above cited to regulate the rates which may be charged by carriers for the intrastate carriage of the household goods of the military personnel of the United States within the State of Georgia" (R. 89).

On the basis of the pleadings and several additional affidavits of military and civilian personnel, the United States filed a motion for summary judgment pursuant to Rule 56(a) of the Federal Rules of Civil Procedure (R. 37). A cross motion for summary judgment was filed by the Commission (R. 90). After oral argument the district court, on October 2, 1961, granted summary judgment for the Commission.

4. At the outset of its opinion the district court noted that the federal government has the power "to prevent any interference by way of state regulatory schemes upon the proper exercise of [federal] activities" and that the states cannot directly regulate the performance by federal officials of governmental functions (R. 92). Georgia's regulation of the rates at which the United States may ship the

household goods of its personnel within the state could only be upheld, the court concluded, if it constituted a non-discriminatory regulation that only "to some degree affect[ed] either the cost of the government's operation within the state or increase[d] difficulties touching on such operation" (R. 92–93). Thus, the issue presented was defined as whether "the Georgia laws place a direct prohibition on agencies of the federal government, or, if not, whether the federal laws authorizing the transportation in question impliedly prohibit inconsistent regulations" (R. 93).

Resolution of this issue, in the court's view, required only a determination of whether *Penn Dairies, Inc.* v. *Milk Control Commission,* 318 U.S. 261, or *Public Utilities Commission of California* v. *United States,* 355 U.S. 534, was controlling on the facts of the instant case. Disagreeing with the basis on which this Court in *California Commission* distinguished *Penn Dairies,* the district court concluded that the only true difference between the cases lay in the "character of the commodities dealt with" (R. 97).[6]

[6] In *Penn Dairies* this Court had found that the state statute "imposes no prohibition on the national government or its officers" (318 U.S. at 270). Finding, in *California Commission,* that the applicable state statute "places a prohibition on the Federal Government" (355 U.S. at 544), the Court concluded that *Penn Dairies* was not pertinent to the problem there involved. The district court below was "not able to conclude that the Supreme Court, in the *California* case, found any distinguishing characteristic here," because it concluded that both the Pennsylvania and California statutes involved in these cases "expressly provided sanctions against shippers who negotiated contracts other than as provided for by the regulatory agency" (R. 96).

It recognized that "there is less of a prohibition on the national government where a state [California] says it may negotiate contracts if it requests and obtains permission to do so, than where a state, like Pennsylvania and like Georgia, flatly says it may not negotiate at all" (R. 96). Nevertheless, the court ruled that "[s]ince the shipment of household goods * * * does not present the unique and difficult problems encountered when military supplies are involved" (R. 97), the decision in *Penn Dairies* was dispositive of this case.[7]

THE QUESTION IS SUBSTANTIAL

The decision of the district court is in direct and admitted conflict with the decision of the Supreme Court of Florida in *United States* v. *Carter*, 121 So. 2d 433 (see App. A, p. 29), and raises questions of widespread importance in the management of the government's extensive transportation operations.[8] It is also in conflict with the rule enunciated by this

[7] The court qualified this choice by stating: "Assuming that the *Penn Dairies* case still stands as a precedent, as we must, we are compelled to conclude that the Georgia Public Service Commission can legally do what the Georgia statute says it can do. If our assumption of the continuing vitality of *Penn Dairies* is incorrect it must remain for the Supreme Court to say so" (R. 99).

[8] The court below decided to assume jurisdiction over the case, rather than to await a determination by the state courts of Georgia, in view of the refusal of the State Commission to allow the United States to intervene as a party in its proceeding looking toward cancellation of the certificate of the carrier which had successfully bid at other than the prescribed rate. We think, in view of the unambiguous nature of the Georgia law (which clearly does not except the United States from its

Court in *Public Utilities Commission of California* v. *United States*, 355 U.S. 534. The Court held there that the federal policy of negotiated rates for transportation of military equipment and the state policy of regulation of negotiated rates were in clear conflict with one another, in violation of the Supremacy Clause, Art. VI, cl. 2, of the federal Constitution. See *Leslie Miller, Inc.* v. *Arkansas*, 352 U.S. 187; *Johnson* v. *Maryland*, 254 U.S. 51; *M'Culloch* v. *Maryland*, 4 Wheat. 316, 427. In this case the district court has held that the same federal policy, as incorporated in the statutes and regulations governing transportation of the household goods of military and civilian personnel of the federal government and their dependents (see App. B, *infra*, pp. 31–40), does not conflict with the policy of the State of Georgia (incorporated into its laws and the determinations of its Public Utilities Commission) prohibiting intrastate carriers from entering into negotiations with the federal government for transporting household goods at rates other than those prescribed by the Commission.

The district court, rejecting as factually invalid this Court's distinction in *California Commission*, *supra*, of its earlier opinion in *Penn Dairies, Inc.* v. *Milk Control Commission*, 318 U.S. 261, held that the transportation of household goods of military and civilian personnel was more closely analogous to the sale of milk to the government, involved in *Penn Dairies*, than

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coverage), this was a permissible action on the part of the federal district court. See *Query* v. *United States*, 316 U.S. 486, 490; cf. *Public Utilities Commission of California* v. *United States*, *supra* at 536–540.

to the transportation of military equipment, involved in the *California Commission* case. We think it erred on both grounds.

1. This Court in *California Commission* "put to one side" the *Penn Dairies* decision:

> There the question, much mooted, was whether the federal policy conflicted with the state policy fixing the price of milk which the United States purchased. The Court concluded that the state regulation "imposes no prohibition on the national government or its officers." *Id.*, at 270. Here, however, the State places a prohibition on the Federal Government. [355 U.S. at 543–44.]

The court below, noting that under Pennsylvania law penalties could be imposed upon "any person" buying or receiving milk at less than approved prices, concluded that this Court could not have found any distinguishing characteristic between the two cases arising out of the differences in the impact of the sanctions (App. A, pp. 26–27). It reasoned, therefore, that the real distinction which this Court found must have lain in the "difference in the character of the commodities dealt with" (*id.* at 28). But, as this Court pointed out in *Penn Dairies* (p. 270), the federal government officials were not there faced with the alternative of paying the fixed Pennsylvania rate for milk or risking the penalties for obtaining lower prices; they could also seek to "procure a supply from without the state" (see *Baldwin* v. *G.A.F. Seelig, Inc.*, 294 U.S. 511)—a possibility unavailable to the government here. In any event, the question is not

whether this Court in *Penn Dairies* erred in relying upon the state court's determination that sanctions could not be imposed upon federal officials (see 318 U.S. at 270). It did so rely and the Court in *California Commission* found this reliance sufficient to distinguish the situation where, as in the case of the Georgia law as well as that of California, criminal sanctions can be imposed on federal officers contracting with a carrier for a special rate (Ga. Code Ann. 68–9911).

2. But assuming *arguendo* that *Penn Dairies* is not distinguishable on the grounds given by this Court in *California Commission*, it does not follow that the federal-state conflict over the transportation of household goods of federal employees is more analogous to the government purchases of milk than to the situation involved in the *California Commission* case. The controlling question is whether there is a direct conflict between state regulation fixing the rates that carriers may charge for transporting household goods within the state and the federal regulatory scheme providing for negotiation of rates for carrying such goods for government personnel. This question is not, we believe, to be determined by an analysis of "the character of the commodities dealt with," as the district court concluded (App. A, p. 28), but rather by an analysis of the conflicting state and federal regulatory schemes.

This analysis, however, has already been made by this Court in the *California Commission* case. Involved there was an identical federal statute and similar regulations "sanction[ing] the policy of nego-

tiating rates for shipment of federal property and entrust[ing] the procurement officers with the discretion to determine when existing rates will be accepted and when negotiation for lower rates will be undertaken" (355 U.S. at 543, footnote omitted). The conflicting California regulatory scheme, as the court below recognized (App. A, p. 26), imposed, if anything, a lesser limitation on authorized federal activity than the Georgia regulatory scheme, in that California provided for the government's negotiation for lower rates with the approval of the state Commission whereas the Georgia prohibition on negotiated rates is absolute. The Court in *California Commission* (355 U.S. at 543) rejected the contention that the limitation upon federal activities was analogous to the non-discriminatory state taxes or regulations imposed on persons doing business with or for the federal government which it had upheld in such cases as *Alabama* v. *King & Boozer,* 314 U.S. 1; *James* v. *Dravo Contracting Co.,* 302 U.S. 134; and *James Stewart & Co.* v. *Sadrakula,* 309 U.S. 94. Instead, it held that the direct "conflict between the federal policy of negotiated rates and the state policy of regulation of negotiated rates seems to us to be * * * as clear as any that the Supremacy Clause, Art. VI, cl. 2, of the Constitution was designed to resolve" (355 U.S. at 544). The case was analogized to the state regulatory plans held to conflict with the paramount federal scheme in *Arizona* v. *California,* 283 U.S. 423, 451; *Johnson* v. *Maryland,* 254 U.S. 51; and *Leslie Miller, Inc.* v. *Arkansas,* 352 U.S. 187. See also *Franklin National Bank* v. *New York,* 347 U.S. 373.

3. Where such a direct conflict exists, the fact that the impact upon the federal government is largely economic will not suffice to save the state regulatory policy. For, as this Court has long recognized, the federal government can establish financial procedures applicable to its activities which may not be upset by a state merely because its contrary regulatory system applies across the board and not merely to federal activities. See *Penn Dairies, supra* at 269. The fact that transportation of household goods—in those instances where it is not part of an over-all shipment of government property—may not involve all of the special problems to which this Court referred in *California Commission* thus does not take this case from under the rule of the *California Commission* decision, as the court below apparently believed. See *United States* v. *Warne,* 190 F. Supp. 645, 654–57 (N.D. Cal.), probable jurisdiction noted, *sub nom. Paul* v. *United States,* January 15, 1962, No. 239, this Term;[9] *Railroad Commission of Texas* v. *United*

[9] In *Paul* the issue presented relates to the conflict between the state and federal regulations governing the purchase of milk by the United States on three military reservations. While questions are raised as to whether the United States exercises exclusive jurisdiction over the places where the milk is sold, see *Pacific Coast Dairy, Inc.* v. *Department of Agriculture of California,* 318 U.S. 285, the United States in its Memorandum in Response to Jurisdictional Statement (at p. 6, n. 5) has expressly reserved its right to argue "that the California Milk Act is unconstitutional insofar as it compulsorily applies to distributor sales to the federal government" because it interferes with federal procurement officers in the performance of their duties "under the Armed Services Procurement Act and regulations issued thereunder."

States, 159 Tex. 197, 202, 317 S.W. 2d 927, 930. In any event, the undisputed record makes clear that more than a mere increase in the cost of the federal government's operations will be involved if the various transportation officials will have to comply, frequently in dealing with a single mass shipment of household goods, with one set of procedures for handling those going interstate and separate sets of procedures for handling those directed intrastate. (See R. 10–11, 41.)

CONCLUSION

The question presented is of importance and probable jurisdiction should be noted.

Respectfully submitted.

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MARCH 1962.

APPENDIX A

In the United States District Court, Northern District of Georgia, Atlanta Division

No. 7528 Civil Action

UNITED STATES OF AMERICA, PLAINTIFF

v.

GEORGIA PUBLIC SERVICE COMMISSION, DEFENDANT

PER CURIAM.

The United States sues to prevent the Georgia Public Service Commission from regulating tariffs charged by carriers within the state of Georgia for the intrastate shipment of household goods of government employees under contracts made with the carriers by government agencies.

The state Commission is under the duty to prevent discriminatory rates for intrastate shipments.[1] It conceives it to be its duty to prevent carriers from contracting with military or other federal government agencies to carry household goods of individual employees of the United States, when such shipments are wholly within the state of Georgia, at less than the published tariffs.

No issue is presented touching on the right of the Commission to regulate the rates charged by Georgia carriers for the carriage of strictly governmental property. The Commission concedes that this issue has been foreclosed in favor of the United States by

[1] See Georgia Code Ann. §§ 93-309, 93-310 and 93-407, as to railroad transportation. See Georgia Code Ann. §§ 68-613, 68-614 and 68-9909, as to motor carrier transportation.

Public Utilities Commission of California v. *United States*, 355 U.S. 534 * * *.

The United States contends that since the carriage of the household goods of its employees, where authorized by law at government expense, is a proper exercise of the constitutional power of the government to engage in the enterprise, it makes no difference whether the carriage is of government property or is of personal property for the moving of which the government is liable. The policy of the federal government to arrange for carriage services, whether by bid or negotiation, at the cheapest responsible price, the government says, is the same in either case.

The Georgia Commission seeks to distinguish the facts here from those which resulted in the Supreme Court's adverse decision in the *California* case, saying that the Court is here dealing with a fact situation that calls for application of the principles laid down by the Supreme Court in the case of *Penn Dairies, Inc., et al.* v. *Milk Control Commission of Pennsylvania*, 318 U.S. 261 * * *.

The case is not a simple one to resolve. All parties agree that under the supremacy clause of the Federal Constitution the federal government has the power, if it elects to exercise it, to prevent any interference by way of state regulatory schemes upon the proper exercise of activities constitutionally engaged in by the federal government.

> It is of the very essence of supremacy to remove all obstacles to its action within its own sphere, and so to modify every power vested in subordinate governments, as to exempt its own operations from its own influence. *M'Culloch* v. *Maryland*, 4 Wheat. 316, 427 * * *.

It is also clear that short of state taxation of the national government or state regulation of the performance of federal officials and agencies of governmental functions, *Ohio* v. *Thomas*, 173 U.S. 276 * * *; *Johnson* v. *Maryland*, 254 U.S. 51 * * *; *Hunt* v. *United States*, 278 U.S. 96 * * *; *Arizona* v. *California*, 283 U.S. 423 * * *, the states may, in the absence of congressional enactment, adopt non-discriminatory taxing statutes, and non-discriminatory regulations under the state's police power that may to some degree affect either the cost of the government's operation within the state or increase difficulties touching on such operation, *Alabama* v. *King & Boozer*, 314 U.S. 1 * * *; *United States* v. *Baltimore & Annapolis R.R. Co.*, 308 U.S. 525 * * *; *Penn Dairies, Inc., et al.*, v. *Milk Control Commission, supra.*

The question we have here to decide, therefore, is whether the Georgia laws place a direct prohibition on the agencies of the federal government, or, if not, whether the federal laws authorizing the transportation in question impliedly prohibit inconsistent regulations.

The state's main reliance is on the Penn Dairies case, supra. There, notwithstanding an existing federal statute authorizing the military services to purchase by bid or negotiated contract the articles of food and other supplies needed for the armed services, the Supreme Court held that a contract made by a Pennsylvania dairyman for supplying the military forces in Pennsylvania at prices less than the established price of the Pennsylvania Milk Control Commission, could validly be treated by the Pennsylvania Commission as a basis for revoking the license of the dairy. The Court dealt with the matter in terms of the legality of the regulatory scheme of the Milk Control Commission when in conflict with the federal

scheme of authorizing purchases at the lowest available price. The Court said [318 U.S. 261 * * *]:

> The dairy's answer to the citation challenged the constitutional authority of the state to regulate prices charged to the United States.

The Court answered this question by saying:

> Here the state regulation imposes no prohibition on the national government or its officers. They may purchase milk from whom and at what price they will, without incurring any penalty. See the opinion below * * *; 148 Pa. Super. 270–271 * * *. As in the case of state taxation of the seller, the government is affected only as the state's regulation may increase the price which the government must pay for milk. By the exercise of control over the seller, the regulation imposes or may impose an increased economic burden on the government, for it may be assumed that the regulation if enforcible and enforced will increase the price of the milk purchased for consumption in Pennsylvania, unless the government is able to procure a supply from without the state, see *Baldwin* v. *Seelig*, 294 U.S. 511. But in this burden, if Congress has not acted to forbid it, we can find no different or greater impairment of federal authority than in the tax on sales to a government contractor sustained in *Alabama* v. *King & Boozer*, *supra*; or the state regulation of the operations of a trucking company in performing its contract with the government to transport workers employed on a Public Works Administration project, upheld in *Baltimore & Annapolis R. Co.* v. *Lichtenberg*, *supra*; or the local building regulations applied to a contractor engaged in constructing a postoffice building for the government, sustained in *Stewart & Co.* v. *Sadrakula*, 309 U.S. 94 (318 U.S. 261, 270) * * *.

The record discloses that many state Public Service Commissions assumed from the language and decision of the Penn Dairies case that they were thus free to regulate the rates to be charged the government uniformly with those to be charged with other shippers for intrastate shipments of government property. This attitude on the part of the California Public Service Commission produced *Public Utilities Commission of California* v. *United States*, 355 U.S. 534 * * *. The California statute, in effect, provided that its Commission should make uniform rates and see to their application without discrimination. It had a special provision, however, favorable to the United States. It provided that upon application by the United States the Commission had the power to authorize variations from the approved tariffs. Objecting to the necessity of applying in each case for the privilege of negotiating a freight rate for the carriage of the many military shipments within the state, the United States brought a suit before a statutory three-judge court in California to enjoin the interference by the Commission with the government's negotiation of rates with carriers as might be agreed upon. All of the evidence dealt with in that case touched upon the transportation of government property. Much of the evidence demonstrated the need for unfettered handling of many of the important and some secret cargoes needed by the military forces.

The federal statutes which established the policy of the United States (10 U.S.C.A. §§ 2301–2314) as implemented by regulations were stated by the Supreme Court to "sanction the policy of negotiating rates for shipment of federal property and entrust the procurement officers with the discretion to determine when existing rates will be accepted and when nego-

tiation for lower rates will be undertaken." 355 U.S. 534, 543 * * *. The Court then said:

> It also seems clear that under Section 530 of the California Public Utilities Code this discretion of the federal officers may be exercised and reduced rates used only if the Commission approves. The question is whether California may impose this restraint or control on federal transportation procurement.

The Court answered this question in the negative, and distinguished Penn Dairies on the ground that:

> There the question, much mooted, was whether the federal policy conflicted with the state policy fixing the price of milk which the United States purchased. The Court concluded that the state regulation "imposes no prohibition on the national government or its officers." Id. at 270. Here, however, the state places a prohibition on the federal government. Here the conflict between the federal policy of negotiated rates and the state policy of regulation of negotiated rates seems to us to be clear.

Our task then is twofold. First, we must determine the factual basis for the distinction drawn in the *California* case between that case and *Penn Dairies*. Second, we must decide which of these two cases more closely parallels the one before us for decision.

The state of Georgia argues that the procedural plan of the California law which put the burden on the United States to apply for special treatment was a distinguishing feature, since it is apparent that under the Pennsylvania law there was an absolute prohibition against the sale of milk at less than the established price and the United States was not named or in any way singled out. The state contends that when the Supreme Court, in the *California* case, called attention to the fact that the Pennsylvania regulation "imposes no prohibition on the national government

or its officers" it sought to point up this procedural matter, since the California law did impose on the national government the need to apply for an exemption if it wanted one. This, it seems to us, is clearly untenable. Certainly there is less of a prohibition on the national government where a state says it may negotiate contracts if its requests and obtains permission to do so, than where a state, like Pennsylvania and like Georgia, flatly says it may not negotiate at all.

In the *California* case, the Court noted that:

> * * * the Public Utilities Code provides penalties for violations of its provisions and orders issued thereunder. §§ 2107, 2112. These penalties are applicable not only to the carrier but to shippers as well. California Public Utilities Code, § 2112. As stated by the District Court, "If a United States officer were to negotiate with a carrier for 'reduced rates' without permitting the defendant to determine whether it 'considered' the conditions of the contract 'just and reasonable', he could be thrown into the county jail." 141 F. Supp., at 186.

In *Penn Dairies,* on the other hand, the Court expressly stated that, "Here the state regulation imposes no prohibition on the national government or its officers. They may purchase milk from whom and at what price they will, without incurring any penalty." 318 U.S. at 270 * * *. The basis for this statement completely escapes us. An examination of the Pennsylvania Milk Control Act reveals that penalties can be imposed on "any person" who "buys or receives" or "offers to buy or receive" milk at other than the approved prices (31 Pa. Stat. § 700j–807).

In view of the fact that both the California law and the Pennsylvania law expressly provided sanctions against shippers who negotiated contracts other

than as provided for by the regulatory agency, we are just not able to conclude that the Supreme Court, in the *California* case, found any distinguishing characteristic here. Moreover, the Courts which have followed the *California* case in striking down state regulatory legislation in the field of transportation have not even mentioned the penalty issue in reaching their decisions. See *Hughes Transportation, Inc.* v. *United States* (Court of Claims 1958), 168 F. Supp. 219, certiorari denied (1959); 359 U.S. 968 * * * [Kentucky Statute]; *Union Transfer Co.* v. *United States* (Court of Claims 1958), 168 F. Supp. 217, certiorari denied (1959) * * * [Nebraska Statute]; *United States* v. *Pennsylvania Public Utility Commission* (1958), 393 Pa. 537, 143 A. (2d) 341, certiorari denied (1958), 358 U.S. 884 * * * [Pennsylvania Statute]; *Railroad Commission of Texas* v. *United States*, 159 Tex. 197 (1958), 317 S.W. 2d 927, [Texas Statute]; *United States* v. *Pentecost, Chairman Tennessee Public Service Commission*, rule 7844 Chancery part 2, Nashville, Tennessee [Tennessee Statute]. See also *Benton Rapid Express, Inc.* v. *United States* (Ct. Cl. 1959), 171 F. Supp, 868, 872 [Georgia Statute]; *Alabama Highway Express, Inc.* v. *United States* (Ct. Cl. 1959), 175 F. Supp. 143, 146 [Alabama Statute]; *United States of America* v. *Carter, et al.* (Florida), 121 So. 2d 433, 437.

In light of the foregoing analysis, we cannot say that the provisions for penalties in the Georgia Statutes (Ga. Code Ann. §68–9909) compels us to follow the California case here.

Finally, the state comments on the distinction between the need for the right to negotiate for the shipment of strictly military goods (the issue in the California case) and the need for the right to negotiate for the purchase of milk (the issue in Penn Dairies) or the shipment of household goods (the

issue in the instant case). Since there are no other significant factual distinctions between *California* and *Penn Dairies*, we can only conclude that the difference in the character of the commodities dealt with was the element which the Supreme Court thought justified its departure in the *California* case from the rule previously followed in *Penn Dairies*. The following language from the opinion in the *California* case is revealing [355 U.S. 534 * * *]:

> The seriousness of the impact of California's regulation on the action of federal procurement officials is dramatically shown by this record.
>
> It is the practice of the Government not only to negotiate separate rates which vary from the class or "paper rate" but also to negotiate a "freight all kinds" rate which will cover hundreds of diverse items for the supply of a division of the Army or for a vessel that are needed at one place at one particular time. There is no provision in the California Code or the regulations for the making of such shipments. The findings are that if the Code is applied here, this type of arrangement would be abolished:
>
> "This would make it necessary for the shipping officers to classify the hundreds and thousands of different items used in military operations, to segregate such items in accordance with published tariffs and classifications, to rearrange the boxing and crating of such items in order to meet the classifications and requirements of commercial traffic and fill out voluminous documents. This additional process could cause delays as high as thirteen hours in the shipment of one truckload or carload. In many situations a delay of this sort would seriously hamper or disrupt the military mission for which the shipment was made."

> Moreover, no rates exist for much of the military traffic, which means that, unless the United States can negotiate rates for each shipment, the shipments will be delayed for Commission action unless shipped under the established rates which are higher than negotiated rates.
>
> General Edmond C. R. Lasher of the United States Army, who was Assistant Chief of Transportation, testified at the trial: "for us to make these arrangements at the Washington level with the various states, let us say 48 States, with 18 varieties of methods to follow, we would find ourselves in an administrative morass out of which we would never fight our way, we would never win the war." 355 U.S. 534, 545, 546 * * *.

See also the discussion as to the significance of the military character of the carriage in the dissenting opinion, 355 U.S. at pages 550 and 551 * * *.

Since the shipment of household goods by the United States does not present the unique and difficult problems encountered when military supplies are involved, it appears that the case before us has more in common with *Penn Dairies* than with *California Commission* v. *United States*. This being so, we must conclude that *Penn Dairies* controls our determination of the issue here.

We do not overlook the fact that our conclusion is at odds with that taken by the Supreme Court of Florida in *United States* v. *Carter, et al, supra*, the only litigated case actually deciding the precise issue involved here, and with the practice followed by a number of state regulatory commissions which have interpreted the California decision as barring state interference with the negotiation of rates for the ship-

ment of household goods by the United States. Since, however, the Supreme Court, in the *California* case, did not overrule *Penn Dairies* but was at pains to distinguish it, there remains the necessity for us to determine which of these cases governs the issue here presented. We have, therefore, examined the cases carefully, and have decided that Georgia's attempt to regulate the rates at which the United States may ship household goods of its military and civilian personnel presents the same issue as was presented by Pennsylvania's attempt to set the price at which the United States could purchase milk for its military personnel. Assuming that the *Penn Dairies* case still stands as a precedent, as we must, we are compelled to conclude that Georgia Public Service Commission can legally do what the Georgia tatute says it can do. If our assumption of the continuing vitality of *Penn Dairies* is incorrect it must remain for the Supreme Court to say so.

It follows that judgment is entered for the defendants on their motion for summary judgment.

This 2nd day of October 1961.

ELBERT P. TUTTLE,
United States Circuit Judge.

FRANK A. HOOPER,
United States District Judge.

BOYD SLOAN,
United States District Judge.

APPENDIX B

Federal Statutory Provisions

1. The Administrative Expenses Act of 1946, 60 Stat. 806, as amended, 5 U.S.C. 73b–1:

> § 73b–1. Travel expenses of transferred employees; transportation of families; household goods and personal effects * * *.
>
> (a) Under such regulations as the President may prescribe, any civilian officer or employee of the Government who, in the interest of the Government, is transferred from one official station to another, * * * for permanent duty, shall * * * be allowed and paid from Government funds the expenses of travel of himself and the expenses of transportation of his immediate family * * * and the expenses of transportation, packing, crating, temporary storage, drayage, and unpacking of his household goods and personal effects * * *.

2. Armed Services Pay and Allowances, 63 Stat. 813, as amended, 37 U.S.C. 253(c):

> (c) Transportation in kind for dependents on change of station; monetary payment in lieu of transportation; baggage and household effects * * *.
>
> In addition to the [travel and transportation] allowances authorized above, under such conditions and limitations * * * as may be prescribed by the Secretaries concerned, members of the uniformed services when ordered to make a change of permanent station shall be entitled to transportation in kind for dependents * * *, to transportation (including

packing, crating, drayage, temporary storage, and unpacking) of baggage and household effects or reimbursement therefor * * *.

3. The pertinent Public Contracts Procurement provisions are 63 Stat. 393, as amended, 41 U.S.C. 251–260. Section 252 provides:

§ 252. Purchases and contracts for property.

(a) Applicability of chapter; delegation of authority.

The provisions of this chapter shall be applicable to purchases and contracts for property or services made by—

(1) The General Services Administration for the use of such agency or otherwise * * *.

* * * * *

(c) Negotiated purchases and contracts for property; conditions.

All purchases and contracts for property and services shall be made by advertising, as provided in section 253 of this title, except that such purchases and contracts may be negotiated by the agency head without advertising if—

* * * * *

(2) The public exigency will not admit of the delay incident to advertising;

* * * * *

(10) for property or services for which it is impracticable to secure competition;

* * * * *

(14) for property or services as to which the agency head determines that bid prices after advertising therefor are not reasonable * * * or have not been independently arrived at in open competition: *Provided,* That * * * (B) the negotiated price is the lowest negotiated price offered by any responsible supplier * * *.

* * * * *

4. The pertinent Armed Services Procurement provisions are 70A Stat. 127, 10 U.S.C. 2301–2314. Section 2304 provides:

> § 2304. Purchases and contracts: formal advertising; exceptions.
>
> (a) Purchases of and contracts for property or services covered by this chapter shall be made by formal advertising. However, the head of an agency may negotiate such a purchase or contract, if—
>
> * * * * * *
>
> (2) the public exigency will not permit the delay incident to advertising;
>
> * * * * * *
>
> (10) the purchase or contract is for property or services for which it is impracticable to obtain competition;
>
> * * * * * *
>
> (15) the purchase or contract is for property or services for which he determines that the bid prices received after formal advertising are unreasonable * * * or were not independently reached in open competition, and for which * * * (B) the negotiated price is lower than the lowest rejected bid of any responsible bidder, as determined by the head of the agency; and (C) the negotiated price is the lowest negotiated price offered by any responsible supplier * * *.

5. The Administrative Services Act of 1949, 63 Stat. 383, 40 U.S.C. 481:

> § 481. Procurement, warehousing, and related activities.
>
> (a) The [GSA] Administrator shall, in respect of executive agencies, and to the extent that he determines that so doing is advantageous to the Government in terms of economy, efficiency, or service * * *.

(1) prescribe policies and methods of procurement and supply of personal property and nonpersonal services, including related functions such as * * * transportation * * *.

* * * * * *

(4) with respect to transportation * * * for the use of executive agencies, represent such agencies in negotiations with carriers and in proceedings involving carriers * * * before Federal and State regulatory bodies * * *.

FEDERAL REGULATIONS

1. Executive Order 10530, 3 CFR, 1954–1958 Compilation, pp. 189–190:

* * * * *

SECTION 1. The Director of the Bureau of the Budget is hereby designated and empowered to perform the following-described functions without the approval, ratification or other action of the President:

* * * * *

(b) the authority vested in the President by [5 U.S.C. 73(b)–1(a), 73(b)–1(b)] to prescribe regulations (1) with respect to the allowance and payment from Government funds of the expenses of travel of any civilian officer or employee of the Government transferred from one official station to another for permanent duty, the expenses of transportation of his immediate family * * *, and the expenses of transportation, packing, crating, temporary storage, drayage, and unpacking of his household goods and personal effects; and (2) with respect to reimbursement to such officer or employee on a commuted basis in lieu of the payment of actual expenses of transportation * * * of his household goods and personal effects * * *

2. Bureau of the Budget Circular No. A–37, December 30, 1957:

Subject: Regulations prescribing revised commuted rates of reimbursement for transportation and temporary storage expenses for household goods and personal effects of civilian officers and employees upon transfer of official station within the continental United States

[Schedules of rates omitted.]

3. Bureau of the Budget Transmittal Memorandum No. 4, February 20, 1960, amending Circular No. A–37:

* * * * *

1. *Purpose.* The regulations prescribed in Bureau of the Budget Circular No. A–37 of December 30, 1957, * * * are amended * * * to provide for use of Government bills of lading for transportation of household goods, instead of the commuted-rate system, for mass movements of household goods transferred between the same two official stations when significant savings will result.

4. Relevant General Services Administration orders:

A. Adm 5450.3, Change 4, July 31, 1959:

* * * * *

142. AUTHORITIES. The Commissioner, TP-US, in carrying out his assigned program responsibilities exercises authority, such as, but not limited to, the following:

a. *Procurement and Contracting.*

* * * * *

(a) Negotiates purchases and contracts for property and services without advertising, and makes any determinations and decisions required in connection therewith * * *.

* * * * *

189. TRANSPORTATION OPERATIONS DIVISION.

* * * * *

b. Negotiates and administers contracts and agreements for special services for which made responsible, such as packing and crating, drayage, * * * and the movement of personal property to new locations for GSA and executive agencies.

B. TPS 7460.1, March 15, 1960:

* * * * *

3. *Objective:*—The objective is to evaluate mass movements of household goods and personal effects and, when feasible, to negotiate with carriers to effect the most economical basis for the movement of such household goods and personal effects.

* * * * *

7. *Requesting Rates From Carriers.*

a. *General.*—When the evaluation by TPUS indicates that savings to the Government * * * may result from arranging with carriers for rates for a mass movement of household goods and personal effects, TPUS shall request eligible carriers to submit rate offers or bids.

b. *Methods used.*

(1) *Formal advertising.* * * *

* * * * *

(2) *Negotiation.*—When the exigency of the movement will not admit of the delay incident to formal advertising, negotiation for the services is authorized. * * *

C. TPS P 7200.3, Change 1, April 4, 1960:

* * * * *

CHAPTER 3. PROCUREMENT AND DISPOSAL ASSISTANCE

PART 1. TRANSPORTATION ASPECTS

* * * * *

4. *Applicability.*—This chapter contains policies and procedures for the guidance of transportation and procurement officials. It is the responsibility of the transportation official to

determine the appropriate delivery terms and advise and assist procurement officials in their use; it is the responsibility of the procurement official to determine the appropriate application of these terms to individual purchase transactions.

5. Relevant Department of Defense Regulations:

A. The Military Traffic Management Regulation [promulgated by order of the Secretaries of the Army, the Navy, and the Air Force], March 1958:

* * * * * *

CHAPTER 102. GENERAL RESPONSIBILITIES AND TRAFFIC MANAGEMENT POLICIES

* * * * * *

102003 *Selection of Carriers or Modes of Transportation.*— * * * In the selection of commercial carriers, the means of transportation selected will be that which produces the lowest overall cost consistent with military requirements, the objectives of governing procurement regulations and the transportation policies as expressed by the Congress. * * *

* * * * * *

CHAPTER 201. FREIGHT TRAFFIC NEGOTIATIONS

201001 *Responsibilities of the Executive Director.*—The Executive Director, Military Traffic Management Agency, is responsible within the Department of Defense for—

a. Determination of proper freight classification, rates, charges, rules and regulations on military traffic.

b. Negotiation with all for-hire carriers of cargo or their rate-making agencies for classifications, rates, charges, rules and regulations on military traffic * * *.

* * * * * *

h. Reviewing and maintaining surveillance over new and reissued freight tariffs and tariff

supplements to determine changes made thereby which would affect the routing or cost of moving military traffic.

i. Reviewing of all for-hire commercial carrier dockets or other proposals to determine the extent to which military traffic would be affected thereby, and taking action required.

j. Recommending litigation in the transportation and traffic management areas when necessary to protect or promote the interests of the Department of Defense.

k. Receipt on behalf of the military departments of all negotiated and voluntary or unsolicited rate tenders relative to—

* * * * *

(5) Rates.

(6) Adjustment of tariff provisions.

(7) Special arrangements pertaining to * * * freight traffic * * *.

* * * * *

201005 *Freight Rate Negotiations. a. Opportunities for rate negotiations.*—Local transportation officers will be constantly alert to identify opportunities for rate negotiations as far in advance of movement as possible. They will forward this information * * * whenever—

(1) A planned volume movement is scheduled to move from one point of origin to one point of destination, for which the transportation charges will be paid by the Government. * * *

(2) A specific movement not of sufficient volume to report under (1) above that because of peculiar characteristics and/or circumstances presents a need for investigation of present transportation costs and possibility of an adjustment thereof.

* * * * *

CHAPTER 214. BILLS OF LADING

* * * * *

*214009 *When Government Bills of Lading Are Required.*—Government bills of lading are required for all shipments moving via commercial carriers between points in the continental United States for which the Government is responsible for payment of transportation charges direct to carriers concerned, except when departmental regulations provide otherwise.

B. The Joint Travel Regulations, Chapter 8, April 1, 1959, provide:

TRANSPORTATION OF HOUSEHOLD GOODS

* * * * *

*8001 DETERMINATION OF MODE OF SHIPMENT

Transportation of household goods is authorized by the mode of transportation * * * which results in the lowest overall cost to the Government and which provides the required service satisfactorily. If the lowest over-all cost mode cannot provide the required service satisfactorily, the next lowest cost mode shall be used. * * *

C. Directive No. 4500.27, July 1, 1960:

Subject: Transportation of household goods of civilian and military personnel

* * * * *

I. *Purpose, Applicability and Objective*

* * * * *

B. The objective of this Directive is to assure high quality service to military and civilian personnel of the Department of Defense in the transportation of their household goods at the lowest over-all cost to the Government.

V. *Implementation*

A. The single manager for Traffic Management * * * is assigned authority and responsibility for:

* * * * *

3. Negotiating with commercial carriers and operators on all matters incident to the transportation of household goods within the United States * * *.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962

Number 81

UNITED STATES OF AMERICA,
Appellant,
vs.
GEORGIA PUBLIC SERVICE COMMISSION,
Appellee.

MOTION

To Affirm the Judgment of the United States District Court for the Northern District of Georgia

and

APPELLEE'S BRIEF

Supporting the Motion to Affirm the Judgment of the United States District Court for the Northern District of Georgia.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

Number 794.

UNITED STATES OF AMERICA,
Appellant,

vs.

GEORGIA PUBLIC SERVICE COMMISSION,
Appellee.

MOTION TO AFFIRM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now the Georgia Public Service Commission, the appellee herein, and pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves the Court to affirm the judgment from which the appeal in the above-entitled cause purports to have been taken, on the ground that it is manifest that the questions on

which the decision of the cause depends are so unsubstantial as not to need further argument.

This, the 11th day of April, 1962.

.....

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The Attorney General,

.....

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1961.

Number 794.

UNITED STATES OF AMERICA,
Appellant,

vs.

GEORGIA PUBLIC SERVICE COMMISSION,
Appellee.

APPELLEE'S BRIEF SUPPORTING THE MOTION TO AFFIRM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

I.

PREFACE.

The Jurisdictional Statement in this case was filed with the Clerk of the Supreme Court on March 15, 1962, and copies of same were received by the Georgia Public Service Commission on March 16, 1962.

II.

OPERATIVE FACTS.

On July 15, 1960, a Regional Director employed by the General Services Administration was requested by the United States Department of Public Health, Communicable Disease, Center of Atlanta, Georgia, to negotiate with carriers for the establishment of economical rates and charges to cover a mass movement of household goods and personal effects of civilian employees of such Communicable Disease Center on transfer from Savannah, Georgia, to Atlanta, Georgia, and vicinity.[1]

On July 27, 1960, the Regional Director invited fifty-four carriers to submit bids for such movement.[2] In response to this invitation thirteen motor carriers submitted timely bids.[3] Eight motor carriers quoted rates as published in a tariff filed with and approved by the Georgia Public Service Commission, and the other five motor carriers, including Consolidated Van & Storage Companies, Inc., submitted bids based on rates lower than those published in such tariff.[4]

Upon evaluating the bids, the Regional Director determined that Consolidated was the lowest responsive bidder and the award by contract was made to such motor carrier on August 5, 1960.[5]

Subsequently, the Georgia Public Service Commission advised Consolidated, and the other four motor carriers who bid lower than the rates published in such tariff, that

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[1] Record, p. 13, 2d par., p. 27, 3d par.

[2] Record, p. 13, 1 par.

[3] Record, p. 14, 1st par., p. 17

[4] Record, p. 14, 1st par.

[5] Record, p. 14, 2d par., 3d par.

should they perform at the rates quoted the Regional Director, they would be in violation of the Commission's rules and subject to having their intrastate operating certificates revoked.[6] By letter dated August 23, 1960, Consolidated advised the Regional Director that it would be unable to perform the services under the contract awarded August 5, 1960.[7]

Later, the Regional Director procured the movement of such household goods and personal effects at charges assessed and collected by a motor carrier pursuant to rates published in a tariff filed with and approved by the Georgia Public Service Commission.[8]

The above rates paid by the United States were prescribed by a household goods commodity tariff filed with and approved by the Georgia Public Service Commission.[9] Household goods are a frequent item of transportation and, consequently, it is the general practice of governmental agencies regulating such transportation to adopt or approve commodity rates for household goods. Practically speaking, no household goods move at the higher class rates.

We should note that the household goods and personal effects involved in such movement constitute private property owned and used by civilian employees of the Federal government and do not constitute property owned or used by the Federal government. The movement originated from the private dwellings of such civilian employees at Savannah, Georgia, and terminated at their private dwellings in Atlanta, Georgia, and vicinity. Consequently, the movement did not involve an area under the exclusive

---

[6] Record, p. 14, 2d par.

[7] Record, p. 14, 3d par., p. 20.

[8] Record, p. 27, 3d par., p. 28.

[9] Record, p. 28, 9th line from top.

jurisdiction of the Federal government, nor did it involve an area rented, leased or otherwise held by the Federal government. Furthermore, such movement was wholly intrastate.

III.

CONTENTIONS OF THE PARTIES.

The United States contends that, by virtue of the Federal Statutes and Regulations referred to in Appendix B of the Jurisdictional Statement, Sections 68-613, 68-614 and 68-9911 of the Code of Georgia of 1933 are unconstitutional insofar as they confer upon the Georgia Public Service Commission the power to regulate the rates in contracts entered into by the United States with motor carriers for the movement of the household goods and personal effects owned by civilian employees of the United States Department of Public Health, when such movement is in intrastate commerce within the State of Georgia. The United States claims that the economic burden imposed upon it by State regulation is a direct interference with its activities.

The Georgia Public Service Commission contends to the contrary, and claims that the economic burden imposed upon the United States is indiscriminate and incidental.

The United States in its contention places chief reliance on *Public Utilities Commission of the State of California v. United States*[10] and the Georgia Public Service Commission in its contention places chief reliance on *Penn Dairies, Inc., and the United States v. Milk Control Commission of the Commonwealth of Pennsylvania.*[11]

---

[10] (1958), 355 U. S. 534, 2 L. ed. 2d 470, 78 S. Ct. 446, reh. den. 356 U. S. 925, 2 L. ed. 2d 760, 78 S. Ct. 713.

[11] (1943), 318 U. S. 261-284, 87 L. ed. 748-761, 63 S. Ct. 617-628.

IV.

THE STATUTES RELIED UPON BY THE UNITED STATES, AS APPLIED TO THE FACTS IN THIS CASE, REQUIRE THAT THE METHOD OF ARRANGING RATES BE ACCOMMODATED TO THE EXISTING STATE REGULATORY FRAMEWORK.

The United States relies upon certain provisions of the Administrative Expenses Act of 1946,[1] the Carrier Compensation Act of 1949,[2] the Federal Property and Administrative Services Act of 1949[3] and an Act of 1956 revising certain Armed Services Procurement provisions,[4] all of which have been amended several times.

Initially, we should note that none of these statutes expressly provide for the immunization of the procurement activities of the Federal government from State rate regulation, irrespective of the fact that all of the statutes were enacted subsequent to *Penn Dairies*, but prior to *Public Utilities*. Under analogous circumstances, this Court held in *Penn Dairies* that "An unexpressed purpose of Congress to set aside statutes of the states regulating their internal affairs is not lightly to be inferred and ought not to be implied where the legislative command, read in the light of its history, remains ambiguous."[5]

We should also recognize that the statutes were enacted in an atmosphere of government regulation of business

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[1] 60 Stat. 806, as amended, 5 U. S. C. 73b-1.

[2] 63 Stat. 802, 814, as amended, 37 U. S. C. 253 (c).

[3] 63 Stat. 377, 383, 393, as amended, 40 U. S. C. 481, 41 U. S. C. 251-260.

[4] 70A Stat. 1, 127, as amended, 10 U. S. C. 2301-2314.

[5] 318 U. S. 275, 1st par., 87 L. ed. 756, 1st col., 2d par. See also: *Graves v. New York* (1939), 306 U. S. 466, 479, 2d par., 83 L. ed. 927, 932, 2d col., 2 par.

which widely involved direct price fixing by legislative enactment by both the Federal and State governments, for the purpose of stabilizing and stimulating various segments of the economy.

We should note that a provision of the Administrative Services Act of 1949,[6] relied on by the United States, provides in part as follows:

> (a) The Administrator shall, in respect of executive agencies, and to the extent that he determines that so doing is advantageous to the Government in terms of economy, efficiency, or service, and with due regard to the program activities of the agencies concerned—
>
> . . . .
>
> (4) *with respect to transportation and other public utility services for the use of executive agencies, represent such agencies in negotiations with carriers and other public utilities and in proceedings involving carriers or other public utilities before Federal and State regulatory bodies;* Provided, That the Secretary of Defense may from time to time, and unless the President shall otherwise direct, exempt the Department of Defense from action taken or which may be taken by the Administrator under clauses (1)-(4) of this subsection whenever he determines such exemption to be in the best interests of national security. (Emphasis supplied.)

Obviously, this provision demonstrates the Congressional intent not to immunize the Federal government from State price fixing in its procurement activities, because otherwise there would be no need for the Administrator to represent Federal agencies in proceedings before State regulatory bodies. We should also note that the

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[6] 63 Stat. 384, 40 U. S. C. Sec. 481. Jurisdictional Statement, p. 33.

only exemption provided by the Congress is in the case of the Department of Defense when the interests of national security are involved.

Another provision of the Administrative Services Act of 1949 provides that "It is the declared policy of the Congress that a fair proportion of the total purchases and contracts for supplies and services for the Government shall be placed with small-business concerns."[7] A virtually identical provision is contained in the Act of 1956 revising certain Armed Services Procurement provisions.[8] These provisions demonstrate a Congressional intent to subjugate the interest in the economical procurement of supplies and services to the higher interest in stabilizing and stimulating the national economy.

It is well established that administrative regulations which exceed statutory delegations of authority are invalid.[9]

Manifestly, the Congress in enacting these statutes did not intend the obtainment of unregulated rates, but the accommodation of the method of arranging rates to the existing State regulatory framework. Had its purpose been merely to insure low rates, it could easily have declared that competitive bidding for government contracts should be unaffected by State regulation.

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[7] 63 Stat. 393, Sec. 302 (b), 41 U. S. C., Sec. 252 (b).

[8] 70A Stat. 127, 10 U. S. C., Sec. 2301.

[9] *Manhattan General Equipment Co. v. Commissioner of Internal Revenue* (1936), 297 U. S. 129, 80 L. ed. 528; *Waite v. Macy* (1918), 246 U. S. 606, 62 L. ed. 892; *United States v. United Verde Copper Co.* (1905), 196 U. S. 207, 49 L. ed. 449; *Morrill v. Jones* (1883), 106 U. S. 466, 27 L. ed. 267.

V.

GEORGIA CRIMINAL STATUTE IS NOT APPLICABLE TO FEDERAL OFFICERS.

Section 68-9911 of the Code of Georgia provides as follows:

> 68-9911. Motor common carrier regulations, violation of.—Every officer, agent, or employee of any corporation and every person who violates or fails to comply with the provisions of Chapter 68-6 relating to the regulation of motor common carriers, or any order, rule, or regulation of the Public Service Commission, or who procures, aids, or abets therein, shall be guilty of a misdemeanor. (Acts 1931, pp. 199, 208.)

The United States contends that this criminal provision is unconstitutional because of its applicability to Federal officers.

In the lower Court, the United States did not attack this Code Section specifically or raise the criminal statute facet of this case. Consequently, the Georgia Public Service Commission was afforded no fair opportunity to place in evidence an affidavit to the effect that the Code Section has never been utilized in the prosecution of a shipper or an agent acting on behalf of a shipper. The Courts of Georgia accord great weight to the administrative interpretation of statutes,[1] and strictly construe criminal stat-

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[1] *Mathis v. Fulton Industrial Corp.* (1929), 168 Ga. 719, 722, 1 par., 149 S. E. 35; *Carroll v. Wright* (1908), 131 Ga. 728, 736 (4), 63 S. E. 260; *Temple Baptist Church v. Georgia Terminal Co.* (1907), 128 Ga. 669, 680, 58 S. E. 157; *Epping v. City of Columbus* (1903), 117 Ga. 263 (7), 273, 43 S. E. 803; *Miller v. Wilson* (1879), 60 Ga. 505; *Solomon v. Commissioners of Cartersville* (1870), 41 Ga. 157, 161, 2d par.; *Richardson v. Maryland Casualty Co.* (1930), 41 Ga. App. 520, 525, 3d par., 153 S. E. 524; *Board of Education v. Bacon* (1918), 22 Ga. App. 72, 78, 2d par., 95 S. E. 753; *Griner v. Baggs & Perry* (1908), 4 Ga. App. 232 (3a), 235, 1st par., 61 S. E. 147.

utes against the State.[2] Hence, the attack comes too late at this stage of the litigation.

Furthermore, Code Section 68-9911 shows on its face its inapplicability to shippers and their agents. Several cases of this Court are apposite to such interpretation.

In *United States v. Farrar*,[3] this Court held that the ordinary purchaser of intoxicating liquor fit for beverage purposes, not belonging to that class of persons who are authorized to sell, purchase or otherwise deal with such intoxicating liquor, was not subject to prosecution under Section 6 of the National Prohibition Act for purchasing liquor without a permit. This Court commented upon the justification for such a construction by stating that "Probably it was thought more important to preserve the complete freedom of the purchaser to testify against the seller than to punish him for making the purchase."[4] This Court reached a similar conclusion in *Gebardi v. United States*[5] involving the prosecution of a woman under the Mann Act. In *Nigro v. United States*[6] the Court held on the same rationale that the evidence was insufficient to support a conviction under the Harrison Anti-Narcotic Act of a retail purchaser of narcotics for his own use. The Court achieved a similar result in *United States v. Boyle*[7] involving a prosecution under a Federal conflict

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[2] *Matthews v. Everett* (1947), 201 Ga. 730, 735, 2d par., 41 S. E. 2d 148; *Wood v. State* (1942), 68 Ga. App. 43 (a), 21 S. E. 2d 915.

[3] (1930), 281 U. S. 624, 74 L. ed. 1078, 50 S. Ct. 425, 68 A. L. R. 892.

[4] Id., 281 U. S. 634, 2d par., 74 L. ed. 1081, upper r. col.

[5] (1932), 287 U. S. 112, 119, 1st par., 77 L. ed. 206, 209, upper r. col.

[6] (C. C. A.—8th—1941), 117 F. 2d 624, 628 (1).

[7] (D. C.—D. Maine—1958), 138 F. Supp. 237, 251 (9).

of interest statute, of a person who gave compensation to a Federal employee.

Georgia Code, Section 68-9911, bears a sharp contrast to Sections 2107, 2110, 2111 and 2112 of the California Public Utilities Code, set forth in the Appendix of this Brief. These California criminal provisions were considered in *United States v. Public Utilities Commission of the State of California*[8] and in *Public Utilities Commission of the State of California v. United States*.[9] These provisions are far more extensive than Georgia Code, Section 68-9911. For instance, the penalties provided by Section 2112 were applicable to every offender whether acting individually or as an officer, agent or employee of a non-utility corporation. The breadth of such a provision would clearly include an offending shipper.[10] On the other hand, the Georgia statute obviously lacks such breadth and sophistication of coverage.

In any event, it seems clear that a State criminal statute would have no applicability to a Federal officer in the performance of his official duties. Even if a State should attempt to so apply such a statute, there would be time enough to properly dispose of such an attempt.

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[8] (D. C.—N. D.—Cal.—1956), 141 F. Supp. 168.

[9] (1958), 355 U. S. 534, 2 L. ed. 470, 78 S. Ct. 446, reh. den., 356 U. S. 925, 2 L. ed. 2d 760, 78 S. Ct. 713.

[10] Id., 355 U. S. 538, 2d par., 2 L. ed. 2d 474, r. col. 2d par.

VI.

ANALYSIS OF PENN DAIRIES AND KINDRED DECISIONS REVEAL THAT THE IMPOSITION BY A STATE OF AN INDISCRIMINATE AND INCIDENTAL BURDEN UPON THE UNITED STATES DOES NOT CONTRAVENE ITS IMPLIED IMMUNITY.

In *Penn Dairies* this Court was confronted with the following facts. The State of Pennsylvania established the Pennsylvania Milk Control Commission with authority to fix minimum wholesale and retail prices for milk sold within the State wherever produced. The Federal government established a military encampment within the State on land leased from the State and subject to its jurisdiction. The Army invited bids for a supply of milk. The Commission sent a notice to all milk dealers interested in submitting bids, including the appellant, of the minimum wholesale prices to be charged. The appellant submitted a bid at prices below the prescribed minima. The bid was accepted and the contract performed. Subsequently, the Commission issued a citation to the appellant to show cause why its application for a renewal of its license should not be denied because of its violation of the Commission's minimum price order. After a hearing, the license application was denied. In an appeal to the Court of Common Pleas, the Federal government was granted leave to intervene, and it continued as a party in all subsequent proceedings in the case.[1] The Commission's order was sustained by the Superior Court and Supreme Court of Pennsylvania. On appeal, this Court held that the judgment be affirmed because the Commission had such authority under the police power of the State and the exercise thereof did not place an unconstitutional burden on the

[1] Id., 318 U. S. 266, 1 par., 87 L. ed. 752, 1 col., 2d par.

Federal government or interfere with its policy of competitive bidding.[2] The Federal procurement statutes and regulations construed by this Court in *Penn Dairies* are analogous to those referred to in Appendix B of the Jurisdictional Statement.

The ratio decidendi of the majority opinion in *Penn Dairies* is tailor-made for the operative facts of the case sub judice as is evidenced by the following excerpt:

> We[3] may assume also that, in the absence of congressional consent, there is an implied constitutional immunity of the national government from state taxation and from state regulation of the performance, by federal officers and agencies, of governmental functions. *Ohio v. Thomas*, 173 U. S. 276, 43 L. ed. 699, 19 S. Ct. 453; *Johnson v. Maryland*, 254 U. S. 51, 65 L. ed. 126, 41 S. Ct. 16; *Hunt v. United States*, 278 U. S. 96, 73 L. ed. 200, 49 S. Ct. 38; *Arizona v. California*, 283 U. S. 423, 75 L. ed. 1154, 51 S. Ct. 522. But those who contract to furnish supplies or render services to the government are not such agencies and do not perform governmental functions, *Metcalf & Eddy v. Mitchell*, 269 U. S. 514, 524, 525, 70 L. ed. 384, 392, 393, 46 S. Ct. 172; *James v. Dravo Contracting Co.*, 302 U. S. 134, 149, 82 L. ed. 155, 166, 58 S. Ct. 208, 114 A. L. R. 318; *Buckstaff Bath House Co. v. McKinley*, 308 U. S. 359, 362, 363, 84 L. ed. 322, 324, 325, 60 S. Ct. 279, and cases cited; cf. *Susquehanna Power Co. v. State Tax Commission*, 283 U. S. 291, 294, 75 L. ed. 1042, 1045, 51 S. Ct. 434; *Helvering v. Mountain Producers Corp.*, 303 U. S. 376, 385, 386, 82 L. ed.

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[2] See also: *Rohrer v. Milk Control Board* (1936), 322 Pa. 257, 186 A. 336; *Milk Control Board v. Gosselin's Dairy* (1938), 301 Mass. 174, 16 N. E. 2d 641; *Paterson Milk & Cream Co. v. Milk Control Board* (1937), 118 N. J. L. 383, 192 A. 838.

[3] Id., 318 U. S. 269, 2d par., 87 L. ed. 753, 1. col., last par.

907, 913, 914, 58 S. Ct. 623, and the mere fact that nondiscriminatory taxation or regulation of the contractor imposes an increased economic burden on the government is no longer regarded as bringing the contractor within any implied immunity of the government for state taxation or regulation. *Alabama v. King & Boozer*, 314 U. S. 1, 9, 86 L. ed. 3, 6, 62 S. Ct. 43, 140 A. L. R. 615; and cases cited; *Baltimore & A. R. Co. v. Lichtenberg*, 176 Md. 383; 4 A. (2d) 734, s. c.; *United States v. Baltimore & A. R. Co.*, 308 U. S. 525, 84 L. ed. 444, 60 S. Ct. 297.

Here the state regulation imposes no prohibition on the national government or its officers. They may purchase milk from whom and at what price they will, without incurring any penalty. See the opinion below, 148 Pa. Super. Ct. 270, 271, 24 A. (2d) 717. As in the case of state taxation of the seller, the government is affected only as the state's regulation may increase the price which the government must pay for milk. By the exercise of control over the seller, the regulation imposes or may impose an increased economic burden on the government, for it may be assumed that the regulation if enforcible and enforced will increase the price of the milk purchased for consumption in Pennsylvania, unless the government is able to procure a supply from without the state, see *Baldwin v. G. A. F. Seelig, Inc.*, 294 U. S. 511, 79 L. ed. 1032, 55 S. Ct. 497, 101 A. L. R. 55. But in this burden, if Congress has not acted to forbid it, we can find no different or greater impairment of federal authority than in the tax on sales to a government contractor sustained in *Alabama v. King & Boozer*, 314 U. S. 1, 86 L. ed. 3, 62 S. Ct. 43, 140 A. L. R. 615, supra; or the state regulation of the operations of a trucking company in performing its contract with the government to transport workers employed on a Public

Works Administration project, upheld in *Baltimore & A. R. Co. v. Lichtenberg*, 176 Md. 383, 4 A. (2d) 734, supra; or the local building regulations applied to a contractor engaged in constructing a post-office building for the government, sustained in *James Stewart & Co. v. Sadrakula*, 309 U. S. 94, 84 L. ed. 596, 60 S. Ct. 431, 127 A. L. R. 821.

The trend of our decisions is not to extend governmental immunity from state taxation and regulation beyond the national government itself and governmental functions performed by its officers and agents. We have recognized that the Constitution presupposes the continued existence of the states functioning in co-ordination with the national government, with authority in the states to lay taxes and to regulate their internal affairs and policy, and that state regulation like state taxation inevitably imposes some burdens on the national government of the same kind as those imposed on citizens of the United States within the state's borders. See *Metcalf & Eddy v. Mitchell*, supra (269 U. S. 523, 524, 70 L. ed. 392, 393, 46 S. Ct. 172). And we have held that those burdens, save as Congress may act to remove them, are to be regarded as the normal incidents of the operation within the same territory of a dual system of government, and that no immunity of the national government from such burdens is to be implied from the Constitution which established the system. See *Graves v. New York*, 306 U. S. 466, 483, 487, 83 L. ed. 927, 934, 937, 59 S. Ct. 595, 120 A. L. R. 1466.

Since the Constitution has left Congress free to set aside local taxation and regulation of government contractors which burden the national government, we see no basis for implying from the Constitution alone a restriction upon such regulations which Congress has not seen fit to impose, unless the regulations are shown

to be inconsistent with Congressional policy. Even in the case of agencies created or appointed to do the government's work we have been slow to infer an immunity which Congress has not granted and which Congressional policy does not require. *Reconstruction Finance Corp. v. J. G. Menihan Corp.*, 312 U. S. 81, 85 L. ed. 595, 61 S. Ct. 485, and cases cited; *Colorado Nat. Bank v. Bedford*, 310 U. S. 41, 53, 84 L. ed. 1067, 1074, 60 S. Ct. 800, aand cases cited; cf. *Baltimore Nat. Bank v. State Tax Commission*, 297 U. S. 209, 80 L. ed. 586, 56 S. Ct. 417. Our inquiry here, therefore, must be whether the state's regulation of this contractor in a matter of local concern conflicts with Congressional legislation or with any discernible Congressional policy.

To establish such a conflict the government places its reliance on Acts of Congress requiring competitive bidding in the purchase of supplies for the Army. . . .

It is to be noted that while these statutes direct government officials to invite competitive bidding by contractors undertaking to furnish Army supplies, and also require them to accept the lowest responsible bid if any is accepted, they do not purport to set aside local price regulations or to prohibit the states from taking punitive measures for violations of such regulations. They are wholly consistent with the continued existence of such price regulations, and with the acceptance by government officers of the regulated price where that is the lowest bid, or the omission of competitive bidding in circumstances where local price regulations render it "impracticable to secure competition." Nor are we able to discern, in the language or legislative history of these or related statutes regulating government contracts, any indication that low cost was such a controlling consideration with Congress as to justify an inference that Congress intended

to displace state regulations affecting the price of articles purchased by the government. The reason for the passage of § 5 of the Act of March 3, 1809, has been said to be "to throw additional safeguards around this subject; to prevent favoritism, and to give to the United States the benefit of competition. . . ." 2 Ops. Atty. Gen. 257, 259.

We are not advised of any statute in which Congress has undertaken to set aside state laws affecting the price of goods supplied to the government in order to secure a lower price than would otherwise be obtainable. And Congress has often required the inclusion in government contracts of terms not directly related to the interests of the government as purchaser, which have the effect of increasing cost. Title III, § 2, of the Act of March 3, 1933, 47 Stat. 1489, 1520, c. 212, 41 U. S. C. A., §§ 10 (a)-10 (c), requires the use of American-produced goods on all public works contracts unless the head of the department finds that the use of such materials is "impracticable" or would "unreasonably increase the cost." The Eight Hour Law of August 1, 1892, 27 Stat. 340, c. 352, as amended, 40 U. S. C. A., §§ 321-326, limits to eight hours per day the work of persons employed by contractors with the government and requires all government contracts to include provisions to that effect. The Davis-Bacon Act of March 3, 1931, 46 Stat. 1494, c. 411, as amended, 40 U. S. C. A., § 276a, requires all contracts for public buildings to contain prevailing minimum wage provisions, and the Walsh-Healy Act (June 30, 1936), 49 Stat. 2036, c. 881, 41 U. S. C. A., § 35, requires the inclusion in all government contracts in excess of $10,000 of provisions requiring the contractor's adherence to prescribed minimum wages, maximum hours, restrictions on employment of child labor and requirements for safety of working conditions.

Evidence is wanting that Congress, in authorizing competitive bidding, has been so concerned with securing the lowest possible price for articles furnished to the government that it wished to set aside all local regulations affecting price. On the contrary, Congress has regarded the field of public contracts as one over which to exercise its supervisory legislative powers in safeguarding interests which may conflict with the needs of the government viewed solely as purchaser. An unexpressed purpose of Congress to set aside statutes of the states regulating their internal affairs is not lightly to be inferred and ought not to be implied where the legislative command, read in the light of its history, remains ambiguous. Considerations which lead us not to favor repeal of statutes by implication, *United States v. Borden*, 308 U. S. 188, 198, 199, 84 L. ed. 181, 190, 191, 60 S. Ct. 182; *United States v. Jackson*, 302 U. S. 628, 631, 82 L. ed. 488, 491, 58 S. Ct. 390; *Posadas v. National City Bank*, 296 U. S. 497, 503-505, 80 L. ed. 351, 355, 356, 56 S. Ct. 349, should be at least as persuasive when the question is one of the nullification of state power by Congressional legislation.

Hence, in the absence of some evidence of an inflexible Congressional policy requiring government contracts to be awarded on the lowest bid despite noncompliance with state regulations otherwise applicable, we cannot say that the Pennsylvania milk regulation conflicts with Congressional legislation or policy and must be set aside merely because it increases the price of milk to the government. It would be no more than speculation for us to say that Congress would consider the government's pecuniary interest as a purchaser of milk more important than the interest asserted by Pennsylvania in the stabilization of her milk supply through control of price. Courts should

> guard against resolving these competing considerations of policy by imputing to Congress a decision which quite clearly it has not undertaken to make. Furthermore we should be slow to strike down legislation which the state concededly had power to enact, because of its asserted burden on the federal government. For the state is powerless to remove the ill effects of our decision, while the national government, which has the ultimate power, remains free to remove the burden.

The rationale of *Penn Dairies* is analogous to that expressed by this Court in numerous other decisions. The tax decisions are particularly helpful in placing in proper perspective the economic burden complained of by the United States in this case.

In *Alabama v. King & Boozer*[4] a contractor erected an Army camp for the United States under a cost-plus contract and this Court upheld a State sales tax on the sale of materials which was ultimately paid by the United States. This Court held that Federal government contractors are not immune from State taxation where the burden imposed is incidental and nondiscriminatory. The Court stated:

> So[5] far as such a nondiscriminatory state tax upon the contractor enters into the cost of the materials to the Government, that is but a normal incident of the organization within the same territory of two independent taxing sovereignties. The asserted right of the one to be free of taxation by the other does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the Government and who have been granted

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[4] (1941), 314 U. S. 1, 86 L. ed. 3, 62 S. Ct. 43.

[5] Id., 314 U. S. 8, 1 par., 86 L. ed. 6, lower l. col.

no tax immunity. So far as a different view has prevailed, see *Panhandle Oil Co. v. Mississippi* and *Graves v. Texas Co., supra*, we think it no longer tenable. See *Metcalf & Eddy v. Mitchell*, 269 U. S. 514, 70 L. ed. 384, 46 S. Ct. 172; *Trinityfarm Constr. Co. v. Grosjean*, 291 U. S. 466, 78 L. ed. 918, 54 S. Ct. 469; *James v. Dravo Contracting Co.*, 302 U. S. 134, 160, 82 L. ed. 155, 172, 58 S. Ct. 208, 114 A. L. R. 318; *Helvering v. Gerhardt*, 304 U. S. 405, 416, 82 L. ed. 1427, 1434, 58 S. Ct. 969; *Graves v. New York*, 306 U. S. 466, 83 L. ed. 927, 59 S. Ct. 595, 120 A. L. R. 1466.

In repudiating the majority view expressed in *Panhandle*, this Court in effect adopted the dissents of Justices Holmes, Brandeis, Stone and McReynolds expressed therein. Justice Holmes dissented as follows:

> The[6] state of Mississippi in 1924 and 1926 imposed upon distributors and retail dealers of gasoline, for the privilege of engaging in the business, an excise tax of three cents and four cents respectively per gallon sold in the state. The supreme court of the state declares it to be a privilege tax but points out that whether this tax is on the privilege or on the property it is imposed before the gasoline has left the dealer's hands. The plaintiff in error, a dealer, was sued by the state for certain sums that were due under the statutes. It pleaded that the sales in respect of which the tax was demanded were sales to the United States for the use of its Coast Guard and Veterans' Hospital, that these being instrumentalities of the government it did not include the amount of the tax in the price charged, and that the statute did not and could not tax the dealer for them consistently

[6] *Panhandle Oil Co. v. Mississippi* (1927), 277 U. S. 218, 222, 1 par., 72 L. ed. 857, 859, 1 col., 3d par., 48 S. Ct. 451, 56 A. L. R. 583.

with the Constitution of the United States. The supreme court of the state upheld the tax and pointed out the extreme consequences to which a different decision might lead.

It seems to me that the state court was right. I should say plainly right, but for the effect of certain dicta of Chief Justice Marshall which culminated in or rather were founded upon his often quoted proposition that the power to tax is the power to destroy. In those days it was not recognized as it is today that most of the distinctions of the law are distinctions of degree. If the states had any power it was assumed that they had all power, and that the necessary alternatives was to deny it altogether. But this court which so often has defeated the attempt to tax in certain ways can defeat an attempt to discriminate or otherwise go too far without wholly abolishing the power to tax. The power to tax is not the power to destroy while this court sits. The power to fix rates is the power to destroy if unlimited, but this court while it endeavors to prevent confiscation does not prevent the fixing of rates. A tax is not an unconstitutional regulation in every case where an absolute prohibition of sales would be one. *New York ex rel. Hatch v. Reardon*, 204 U. S. 152, 162, 51 L. ed. 415, 423, 27 Sup. Ct. Rep. 188.

To come down more closely to the question before us, when the government comes into a state to purchase I do not perceive why it should be entitled to stand differently from any other purchaser. It avails itself of the machinery furnished by the state and I do not see why it should not contribute in the same proportion that every other purchaser contributes for the privileges that it uses. It has no better or other right to use them than anyone else. The cost of maintaining the state that makes the business possible is

just as necessary an element in the cost of production as labor or coal. If the plaintiff in error had paid the tax and had added it to the price the government would have had nothing to say. It could take the gasoline or leave it but it could not require the seller to abate his charge even if it had been arbitrarily increased in the hope of getting more from the government than could be got from the public at large. But in fact the government has not attempted to say anything in this case, which is simply that of a dealer trying to cut down a legitimate tax on his business because certain purchasers proposed to use the goods in a certain way, although so far as the sale was concerned they were free to turn the gasoline into the ocean, use it for private purposes or sell it again. It does not appear that the government would have refused to pay a price that included the tax if demanded, but if the government had refused it would not have exonerated the seller. *Pierce Oil Corp. v. Hopkins*, 264 U. S. 137, 139, 68 L. ed. 593, 596, 44 Sup. Ct. Rep. 251.

An imperfect analogy with taxation that affects interstate commerce is relied upon. Even the law on that subject has been liberalized since the decision of most of the cases cited. *Sonneborn Bros. v. Cureton (Sonneborn Bros. v. Keeling)*, 262 U. S. 506, 67 L. ed. 1095, 43 Sup. Ct. Rep. 643. But obviously it does not follow from the invalidity of a tax directly burdening interstate commerce that a tax upon a domestic seller is bad because he may be able to shift the burden to a purchaser, even though an agency of the government, who is willing to pay the price with the tax and who has no rational ground for demanding favor. I am not aware that the President, the Members of Congress, the Judiciary or, to come nearer to the case in hand, the Coast Guard or the officials of the

> Veterans' Hospital, because they are instrumentalities of government and cannot function naked and unfed, hitherto have been held entitled to have their bills for food and clothing cut down so far as their butchers and tailors have been taxed on their sales; and I had not supposed that the butchers and tailors could omit from their tax returns all receipts from the large class of customers to which I have referred. The question of interference with Government, I repeat, is one of reasonableness and degree and it seems to me that the interference in this case is too remote. *Metcalf v. Mitchell*, 269 U. S. 514, 70 L. ed. 384, 46 Sup. Ct. Rep. 172.

In *Graves v. New York*[7] this Court held that the imposition by a State of a non-discriminatory income tax in respect of the salary of an employee of a corporate instrumentality of the Federal government does not place an unconstitutional burden on the Federal government where the Congress has not conferred on the salaries of the employees of such instrumentality an immunity from State taxation. This Court, speaking through Justice Stone, stated as follows:[8]

> So much of the burden of a non-discriminatory general tax upon the incomes of employees of a government, state or national, as may be passed on economically to that government, through the effect of the tax on the price level of labor or materials, is but the normal incident of the organization within the same territory of two governments, each possessing the taxing power. The burden, so far as it can be said to exist or to affect the government in any indirect or incidental way, is one which the Constitu-

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[7] (1939), 306 U. S. 466, 83 L. ed. 927, 59 S. Ct. 595, 120 A. L. R. 1466.

[8] Id., 306 U. S. 487, 1st par., 83 L. ed. 937, 1 col., 2d par.

tion presupposes, and hence it cannot rightly be deemed to be within an implied restriction upon the taxing power of the national and state governments which the Constitution has expressly granted to one and has confirmed to the other. The immunity is not one to be implied from the Constitution, because if allowed it would impose to an inadmissible extent a restriction on the taxing power which the Constitution has reserved to the state governments.

The rationale expressed in *Penn Dairies, King & Boozer* and *Graves* is reflected in the following decisions: *Trinity-farm Construction Co. v. Grosjean* (1934), 291 U. S. 466, 78 L. ed. 918, 54 S. Ct. 469 (Held that no unconstitutional taxation of means or instrumentalities of Federal government is involved in the imposition of a State excise tax on gasoline consumed by a contractor with the United States in the performance of a contract for the construction of levees.); *James v. Dravo Contracting Co.* (1937), 302 U. S. 134, 160, 82 L. ed. 155, 172, 58 S. Ct. 208, 114 A. L. R. 318 (Held that an occupation tax measured by gross income is not invalid where imposed by a State upon a contractor with the United States as laying a direct burden on the Federal Government, even though the imposition of the tax may increase the cost to the Government of the work contracted to be done); *Morgan Co. v. Arkansas for use of Phillips County* (1941), 202 Ark. 404, 150 S. W. 2d 736, app. dism. (1941), 314 U. S. 571, 86 L. ed. 463, 62 S. Ct. 77, reh. den. (1941), 314 U. S. 711, 86 L. ed. 567, 62 S. Ct. 175 (Held that a foreign corporation engaged in construction of a levee in Arkansas under Federal contract negotiated outside the State was not exempt from compliance with statutory requirements for doing business in the State of Arkansas); *Alward v. Johnson* (1931), 282 U. S. 509, 75 L. ed. 496 (Held that one having a contract to carry the mails is not immune as an agency of the Federal government from state taxation of property used in

the performance of such contract, even though the tax is based upon the gross receipts from his contract with the government); *Reconstruction Finance Corp. v. Menihan Corp.* (1941), 312 U. S. 81, 85 L. ed. 595 (Held that in conferring upon the RFC power to sue and to be sued, and in failing to endow it with the Federal government's immunity from liability for costs, Congress has indicated an intention to subject it to the liability of an unsuccessful litigant to costs and to the additional allowance made by courts of equity in accordance with equity practice); *Colorado National Bank of Denver v. Bedford* (1940), 310 U. S. 41, 84 L. ed. 1067 (Held that a state statute requiring a national banking corporation to collect and remit to the state the amount of a tax imposed upon the value of safe deposit box services rendered to its customers and allowing the bank a portion of the tax as compensation for the burden of collection, being a tax on customers and not upon the bank, does not impose an unconstitutional burden on a Federal instrumentality); *Trotter v. Tennessee* (1933), 290 U. S. 354, 78 L. ed. 358 (Held that the exemption from taxation of compensation paid by the United States to its disabled veterans and of disability benefits under a policy of war risk insurance, conferred by Federal statute, is lost when the money is converted into land and buildings); *James Stewart & Co. v. Sadrakula* (1940), 309 U. S. 94, 84 L. ed. 596 (Held that the provisions of a state labor law requiring contractors constructing buildings to board over all open steel tiers for the protection of their employees continue operative in territory over which the United States has acquired exclusive jurisdiction, and are applicable to a contractor constructing a post office therein); and *Susquehanna Power Co. v. State Tax Commission of Maryland* (1931), 283 U. S. 291, 75 L. ed. 1042 (Held that lands acquired by a licensee of the FPC for the construction of a dam in a navigable river, and used as a part of its licensed power project, are not within

the immunity from state taxation enjoyed by instrumentalities of the Federal government). See also: *Railway Mail Association v. Corsi* (1945), 326 U. S. 88, 89 L. ed. 2072; *Buckstaff Bath House Co. v. McKinley* (1939), 308 U. S. 358, 84 L. ed. 322; *Helvering v. Mountain Producers Corp.* (1938), 303 U. S. 376, 82 L. ed. 907; *Metcalf v. Mitchell* (1926), 269 U. S. 514, 70 L. ed. 384; *Commonwealth v. Closson* (1918), 229 Mass. 329, 118 N. E. 653, L. R. A. 1918C 929; *Railroad Co. v. Lichtenberg* (1939), 176 Md. 383, 4 A. 2d 734, app. dism. (1939), 308 U. S. 525, 84 L. ed. 444, 60 S. Ct. 297.

The tax decisions considered above imposed an enormous economic burden upon the United States. However, in each case the burden was upheld because its imposition was indiscriminate and incidental and, hence, did not contravene the implied immunity of the United States.

VII.

ANALYSIS OF PUBLIC UTILITIES AND KINDRED DECISIONS REVEAL THAT STATE ACTION CONTRAVENES THE IMPLIED IMMUNITY OF THE FEDERAL GOVERNMENT.

In *Public Utilities*[1] this Court held invalid under the supremacy clause of the Federal Constitution a California statute prohibiting carriers from transporting property owned by the Federal government at rates other than those approved by the California Public Utilities Commission on the ground that such statute interfered with the United States in performing its function of providing for the national defense.

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[1] *Public Utilities Commission of the State of California v. United States* (1958), 355 U. S. 534, 2 L. ed. 2d 470, 78 S. Ct. 446, reh. den. 356 U. S. 925, 2 L. ed. 2d 760, 78 S. Ct. 713.

In order to obtain the full impact of *Public Utilities*, we will begin this analysis by reviewing the relevant aspects of the opinion and judgment of the Three-Judge District Court[2] which was affirmed by this Court.

The District Court began its opinion with the following statement:

> "To[3] git thar fustest with the mostest men" was the recipe for victory announced by General Nathan Bedford Forrest, the Confederate cavalry leader.
>
> There is as much military wisdom in that dictum today as there was a century ago. In this atomic age, speed in the movement of men and supplies is still necessary.
>
> In the instant case, the theory of the plaintiff, as expressed in its complaint, is that if Section 530 of the Public Utilities Code of California, as amended in 1955, infra, hereinafter referred to as "Sec. 530", is held to apply to shipments made by the plaintiff, "it would greatly impede the discharge by the United States of its constitutional powers and responsibilities by inevitably causing delays in such shipments when time is of the essence and in many situations would expose to the public patterns of movement and traffic which would be subject to interpretation by the intelligence agents of foreign powers and might jeopardize the security of the United States."

The District Court reported Section 530 to read as follows:

> "Every[4] common carrier * * * may transport, free or at reduced rates: (a) *Persons* for the United

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[2] *United States v. Public Utilities Commission of the State of California* (D. C.—N. D. Cal.—1956), 141 F. Supp. 168.

[3] Id., 141 F. Supp. 170, r. col.

[4] Id., 141 F. Supp. 174, l. col.

> States, state, county, or municipal governments, or persons or property for charitable or patriotic purposes * * *. The commission may permit common carriers to transport property at reduced rates for the United States, state, county or municipal governments, *to such extent and subject to such conditions as it may consider just and reasonable*. Nothing herein shall prevent any common carrier subject to the provisions of this part from transporting property for the United States, state, county, or municipal governments, at reduced rates *no lower than rates which lawfully may be assessed and charged by any other such common carrier or by highway permit carriers* * * *" (California Stat., 1955, c. 1966). (Emphasis supplied).

The District Court questioned Section 530 in the following terms:

> May[5] a State statute *empower a* State Commission, however patriotic and well intentioned that Commission may be, to "permit common carriers to transport property at reduced rates for the United States, state, county or municipal governments, *to such extent and* SUBJECT *to such conditions as* IT *may consider just and reasonable*"? (Emphasis supplied)

and answered the question in the negative.

After giving a statement of the case and the pleadings therein, the District Court summarized the testimony.

The principal witness of the United States was Brigadier General Lasher who represented the Department of Defense.[6]

General Lasher explained the relationship between commodity and class rates as follows:

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[5] Id., 141 F. Supp. 171, 1. col., last par.

[6] Id., 141 F. Supp. 174, 1. col., last par.

"Well,[7] it's the law that carriers must—we will take the railroads—must be able to quote a rate to a prospective customer on any item from any point in the United States to any other point in the United States. It was apparently impossible to price each and every item of commerce. So these items of commerce were placed in about a dozen classes. However, it is quite obvious that there would be no movement of oranges from Maine to Florida, yet there is an applicable rate in these class rates.

"As commerce grew, industry spread out, it was necessary to afford industry a cost of movement more nearly geared to the requirements of that movement, so that the goods upon arrival at destination were not too costly for the consumer, and a system of commodity rates in lieu of class rates grew up.

"The commodity rate is a rate from a point of manufacture, let's say, to a point of distribution or consumption, which is based upon a volume move, based upon the facility of the manufacturer to get his goods to market, allowing him as much in the way of profit as possible and the carrier, too. So we find that commodity rates generally move commerce in the United States today. Class rates do not. As a matter of fact, they are popularly referred to as paper rates, rates which are on the books to satisfy the law."

General Lasher then described a war experience in Korea which illustrated the importance of logistics.[8] He concluded this description by stating that:

"Nothing[9] must be placed as an impediment to the complete flexibility and flow of movement of supplies

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[7] Id., 141 F. Supp. 175, lower 1 col.

[8] Id., 141 F. Supp. 175, r. col., 3d par.

[9] Id., 141 F. Supp. 176, l. col., 2d par.

to our troops in foreign theaters, whether it's in peace or in war."

In reply to a question regarding the effect that State regulation of rates for intrastate shipments of the Federal government's material "would have on the supply lines and logistical system of the United States,"[10] the General said:

> "Now,[11] then, for us to make these arrangements at the Washington level with the various states, let us say 48 states, with 48 varieties of methods to follow, we would find ourselves in an administrative *morass* out of which we would never fight our way. *We would never win the war!* Our negotiations for these arrangements, and I don't say just rates, but our negotiations for arrangements for the movement of traffic must be flexible; they must be direct with the parties in interest, *and they must be as secure as possible.*
>
> "We haven't touched on the security yet, but security is of primary importance to us * * *. Were we to spread * * * the record of the characteristics of our freight before the public and the parties at interest, we would seriously jeopardize that security, and in some cases be in violation of the law." . . .
>
> "There are many items which move today which are not described, some items which are willfully misdescribed in order to hide their identity, and they are moving in quantity. The only people who know what they are are about four. The carrier, whether he be a highway carrier or rail, usually doesn't know what he is carrying; but he has been told by one of his officials that that is what he will carry and the billing

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10 Id., 141 F. Supp. 176, l. col., 3d par.

11 Id., 141 F. Supp. 176, r. col., 1st par.

will be such and such and the security of that item is thereby maintained.

"Were we to have to go through a regulatory body, we would never be able to accomplish this."

The General added that State regulation of rates would tend to increase the freight bill of the Federal Government:

"Getting back to these class and commodity rates again, the procedure would be so cumbersome and so time-consuming that we would, in desperation, ship on the class-rate structure rather than wait for the procedures to be consummated and thereby increase considerably our transportation cost."

The District Court then related the testimony of another witness for the United States, Lieutenant Colonel Hall, who testified as to the complexity of having to segregate a large number of diverse items and rate each separately for shipment in intrastate commerce.[12] Colonel Hall then testified as to the security aspects of military shipments as follows:

On[13] the subject of required secrecy in certain cases, Colonel Hall stated that "really over a period of time *every military shipment is in a sense a security shipment.*"

"I had some experience in Europe in that situation," the Lieutenant Colonel explained. "A trained intelligence worker, espionage worker, can develop an amazing amount of accurate information just through looking at the records, say, for a month's time on our very prosaic shipments . . . shoes, medical supplies and food. Actually, a month's record of shipments

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[12] Id., 141 F. Supp. 178, l. col., 2d par.

[13] Id., 141 F. Supp. 179, lower l. col.

to an installation will indicate how many troops are there, the status of training of the troops, the status of their health and their overall motion as well as their ultimate destination."

Colonel Hall added that he did not think it would be possible to reveal the necessary data for logical and reasonable rate approval purpose in connection with many of the shipments that are secret in nature.

"If everything is to be made public, we might as well publish it in the newspapers," he declared.

Lieutenant Colonel Flanegan of the United States Army, another witness for the United States, emphasized the security aspect of military movements[14] and the unreasonable cost of class rates in comparison with commodity rates.[15]

Lieutenant Commander Bengtson of the United States Navy testified that delays caused by State regulation might be crucial for operational purposes in the Navy[16] and that such regulation would be detrimental to Navy security requirements.[17]

Colonel Chambers of the United States Air Force testified as follows:

> "I'd say 'definitely'," he explained, "because we —our logistics system is based on *speed* and we cannot tolerate anything that would interfere with speed. And, as I have pointed out previously, this Air Force

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[14] Id., 141 F. Supp. 179, lower r. col.

[15] Id., 141 F. Supp. 180, l. col., 2d par.

[16] Id., 141 F. Supp. 180, r. col., 2d par.

[17] Id., 141 F. Supp. 181, l. col., 2d par.

[18] Id., 141 F. Supp. 181, l. col., 5th par.

> mission is worldwide, and I think every one recognizes the importance that Strategic Air Command has played in present world affairs."
>
> Referring to "security-type shipments", Colonel Chambers testified that "we wouldn't want to reveal the number of shipments that do develop, nor the numbers (number?) of missiles that are involved or the points of origin and destination. We would certainly not * * * want to do it, and we would conceal that in so far as possible."

Lieutenant Colonel Eastham of the United States Marine Corps testified that the classification for rate purposes of many diverse items for shipment would slow down the movement of freight,[19] increase cost and interfere with secrecy.[20]

The District Court then briefly reviewed the testimony of witnesses appearing on behalf of the Public Utilities Commission and then went into an examination of the merits of the case.

The District Court distinguished *Penn Dairies* as follows:

> In[21] the first place, the State regulation imposed "no prohibition on the national government or its officers." They might "purchase milk from whom and at what price they (wished), without incurring any penalty". Here, however, as we have seen, there are penalties that could be imposed upon any officer of the United States who violates the provisions of the Public Utilities Act. Section 2112 provides:

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[19] Id., 141 F. Supp. 181, r. col., 2d par.

[20] Id., 141 F. Supp. 181, r. col., 4th par.

[21] Id., 141 F. Supp. 180, r. col., 1st par.

> "Every person who, either individually, or acting as an officer, agent, or employee of a corporation other than a public utility, violates any provision of this part, or fails to comply with any part of any order, decision, rule, direction, demand, or requirement of the commission, or who procures, aids, or abets any public utility in such violation or non-compliance, in a case in which a penalty has not otherwise been provided for such person, is guilty of a misdemeanor, and is punishable by a fine not exceeding one thousand dollars ($1,000), or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment."

But over and beyond this, the Penn case did not involve the procurement of the engines of war. There is a constitutional difference between a milk can and a hydrogen bomb!

The District Court concluded by finding that the United States presented evidence in abundance to substantiate its contentions,[22] and held that the United States was entitled to the relief sought by it.[23]

On appeal, this Court recognized that "The seriousness of the impact of California's regulation on the action of federal procurement officials is dramatically shown by this record."[24]

In affirming the judgment of the District Court, this Court carefully distinguished *Penn Dairies* and kindred decisions in the following manner:

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[22] Id., 141 F. Supp. 190, l. col., last par.

[23] Id., 141 F. Supp. 190, r. col., 2d par.

[24] *Public Utilities Commission v. United States* (1958), 355 U. S. 534, 544, 3d par., 2 L. ed. 2d 470, 478, l. col., 3d par., 78 S. Ct. 446.

We[25] lay to one side these cases which sustain nondiscriminatory state taxes on activities of contractors and others who do business for the United States, as their impact at most is to increase the costs of the operation. See, e. g., *Esso Standard Oil Co. v. Evans*, 345 U. S. 495, 97 L. ed. 1174, 73 S. Ct. 800; *Smith v. Davis*, 323 U. S. 111, 89 L. ed. 107, 65 S. Ct. 157; *Alabama v. King & Boozer*, 314 U. S. 1, 86 L. ed. 3, 62 S. Ct. 43, 140 A. L. R. 615; *James v. Dravo Contracting Co.*, 302 U. S. 134, 82 L. ed. 155, 58 S. Ct. 208, 114 A. L. R. 318. We also need do no more than mention cases where, absent a conflicting federal regulation, a State seeks to impose safety or other requirements on a contractor who does business for the United States. See, e. g., *Baltimore & A. R. Co. v. Lichtenberg*, 176 Md. 383, 4 A. 2d 734, app. dism'd 308 U. S. 525, 84 L. ed. 444, 60 S. Ct. 297; *James Stewart & Co. v. Sadrakula*, 309 U. S. 94, 84 L. ed. 596, 60 S. Ct. 431, 127 A. L. R. 821; *Penn Dairies v. Milk Control Com.*, 318 U. S. 261, 87 L. ed. 748, 63 S. Ct. 617, can likewise be put to one side. There the question, much mooted, was whether the federal policy conflicted with the state policy fixing the price of milk which the United States purchased. The Court concluded that the state regulation "imposes no prohibition on the national government or its officers." Id. 318 U. S. at 270. Here, however, the State places a prohibition on the Federal Government. Here the conflict between the federal policy of negotiated rates and the state policy of regulation of negotiated rates seems to us to be clear. The conflict is as plain as it was in *Arizona v. California*, 283 U. S. 423, 451, 75 L. ed. 1154, 1163, 51 S. Ct. 522, where a State sought authority over plans and specifications for a federal

[25] Id., 355 U. S. 543, 2d par., 2 L. ed. 477, 1. col., last par.

dam, in *Leslie Miller, Inc. v. Arkansas*, 352 U. S. 187, 1 L. ed. 2d 231, 77 S. Ct. 257, supra, where state standards regulating contractors conflicted with federal standards for those contractors, and in *Johnson v. Maryland*, 254 U. S. 51, 65 L. ed. 126, 41 S. Ct. 16, where a State sought to exact a license requirement from a federal employee driving a mail truck. The conflict seems to us to be as clear as any that the Supremacy Clause, Art. 6, cl. 2, of the Constitution was designed to resolve.

Public Utilities apparently does not involve any change in doctrine by this Court because the following three Michigan cases were decided on the same day as *Public Utilities*.

In *United States v. City of Detroit*[26] this Court held that a state tax assessed against a private corporation engaged in business for profit based upon the value of realty owned by the United States and leased to the corporation under a lease permitting the corporation to deduct from the agreed rental any such taxes paid by it but reserving to the United States the right to contest the validity of such taxes, did not invade the constitutional immunity of Federal property from taxation by the States or discriminate against the United States or those with whom it deals. This Court further held that the Federal government's constitutional immunity does not shield private parties leasing Federally owned realty from State taxes imposed on them merely because part or all of the financial burden of the taxes eventually falls on the Federal government. This Court reached a similar conclusion in *United States v. Township of Muskegon*.[27] In *City of*

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[26] (1958), 355 U. S. 466, 2 L. ed. 2d 424, 78 S. Ct. 474

[27] (1958), 355 U. S. 484, 2 L. ed. 2d 436, 78 S. Ct. 483

Detroit v. Murray Corporation of America[28] this Court held that a State tax, based in part on the value of materials and work in process actually in the possession of a subcontractor but legal title to which has passed to the United States, did not infringe the Federal government's constitutional immunity from State taxation or discriminate against the Federal government, its property or those with whom it does business. This Court recognized that the Federal government will eventually feel the financial burden of at least some of such tax, but held that the imposition of an increased financial burden on the Federal government did not by itself invalidate a State tax.

The ratio decidendi of *Public Utilities* is consistent with that expressed in *Arizona v. California*[29] and *Johnson v. Maryland*.[30]

In *Arizona v. California* this Court held that the United States may perform its functions such as building a dam to improve navigation without obtaining approval of its plans and specifications as required by State statute. In *Johnson v. Maryland* this Court held that a State law requiring the operator of a mail truck to obtain a license as a condition to his right to drive it, in effect, to perform his job, was invalid when applied to government servants.

In *Public Utilities* this Court struck down State regulation of the movement of military supplies because such regulation directly interfered with the performance of the Federal function of providing for the national defense.

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[28] (1958), 355 U. S. 489, 2 L. ed. 2d 441, 460, 78 S. Ct. 458, 486.

[29] (1931), 283 U. S. 423, 75 L. ed. 1154, 51 S. Ct. 522.

[30] (1920), 254 U. S. 51, 65 L. ed. 126, 41 S. Ct. 16.

These decisions show that a State's exercise of its police power contravenes the implied immunity of the Federal government if it regulates a matter solely within the sphere of Federal sovereignty, or if it interferes with the exercise of Federal functions by the Federal government itself or by its selected instrumentalities.

VIII.

PENN DAIRIES AND PUBLIC UTILITIES ARE IN HARMONY AND THE FACTS IN THIS CASE ARE GOVERNED BY PENN DAIRIES.

The doctrine evinced by *Penn Dairies*, *King & Boozer*, *Draco*, *Graves* and analogous decisions, demonstrate that an indiscriminate and incidental economic burden placed on the United States as a result of State regulation or taxation is not unconstitutional, provided there is no clear Congressional intent shown to immunize against such a burden. The Congressional immunization question is foreclosed in this case because the statutes considered herein are analogous to those construed by the Court in *Penn Dairies*. Under such circumstances, the amount of the economic burden is not a determining factor as is illustrated by the tax decisions which resulted in enormous economic burdens being placed on the United States.

But such burdens are fair. Justice Holmes in his dissent in *Panhandle* explained why when he stated: "It (United States) avails itself of the machinery furnished by the state and I do not see why it should not contribute in the same proportion that every other purchaser contributes for the privileges that it uses. It has no better or other right to use them than anyone else."

Georgia's scheme of regulating motor carrier transportation is similar to that adopted by the vast majority of her

sister States. The public interest sought to be served in such regulation "lies inter alia in providing safe and efficient transportation equipment; in the maintenance of adequate transportation facilities and service, regularly sustained in any specific territory or area; in providing specialized service essential for handling and delivering special types of merchandise or commodities; in the avoidance of undue and unnecessary travel and traffic congestion on the public highways; and in the maintenance of such reasonable rates and charges for the service as will give the shipper and the public using the commodity shipped the best possible economic advantage consistent with successful operation, taking into consideration in all these respects the natural advance in the quality of service in the field of transportation."[1] A significant purpose in all of such regulation is to secure adequate, sustained service for the public at the *lowest reasonable cost* without unjust discrimination or *destructive competitive practices*.[2]

When the United States avails itself of an intrastate transportation system regulated by a state, the United States should pay its fair share of the cost necessary to adequately maintain such a system. The theory of State

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[1] *Columbus-Cincinnati Trucking Company v. Public Utilities Commission* (1943), 141 Ohio St. 228, 47 N. E. 2d 623, 626 (6). See also: *Re Southern Pacific Motor Transport Company* (Cal. R. Com.—1928), P. U. R. 1929A. 193, 199, 2d par.; *Seaboard Air Line Ry. Co. v. Wells* (1930), 100 Fla. 1027, 130 So. 587, 591 (3), P. U. R. 1931A. 433; *Omaha Transit Company v. Briggs* (1959), 167 Neb. 703, 94 N. W. 2d 461, 467 (2), 28 P. U. R. 3d 26; *State v. Queen City Coach Company* (1951), 233 N. C. 119, 63 S. E. 2d 113, 115 (1); 88 P. U. R. N. S. 284; *Taylor-Edwards Warehouse & Transfer Co. v. Dept. of Public Service* (1945), 22 Wash. 2d 565, 569, 157 P. 2d 309, 310 (3), 58 P. U. R. N. S. 521; *Re United Parcel Service of Seattle* (Wash. Pub. Ser. Com.—1955), 12 P. U. R. 3d 22, 27 (2); 60 C. J. S., Motor Vehicles, Sec. 44 (b), p. 187.

[2] Id.

regulation of rates is to fix them at the lowest reasonable level necessary to maintain the economic stability of the industry regulated. The United States is the biggest spender in the nation. To permit the tremendous economic force to penetrate the rate floors established by state regulation would stimulate destructive competition in a regulated industry. The effect would be a heavy economic depressant operating on a national scale. Should such a result be readily inferred from congressional legislation? The Court has answered the question in the negative on numerous occasions.

The following words of the Court, spoken through Justice Frankfurter in *Palmer v. Massachusetts*,[3] are apposite here:

> "And so we have one of those problems in the reading of a statute wherein meaning is sought to be derived not from specific language but by fashioning a mosaic of significance out of the innuendoes of disjointed bits of a statute. At best this is subtle business, calling for great wariness lest what professes to be mere rendering becomes creation and attempted interpretation of legislation becomes legislation itself. Especially is wariness enjoined when the problem of construction implicates one of the recurring phases of our federalism and involves striking a balance between national and state authority in one of the most sensitive areas of government.
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> To be sure, in recent years Congress has from time to time exercised authority over purely intrastate activities of an interstate carrier when, in the judgment of Congress, an interstate carrier constituted, as a matter of economic fact, a single organism and could

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3 (1939), 308 U. S. 79, 83, 2d par., 84 L. ed. 93, 97, r. col., 2d par.

not effectively be regulated as to some of its interstate phases without drawing local business within the regulated sphere. But such absorption of state authority is a delicate exercise of legislative policy in achieving a wise accommodation between the needs of central control and the lively maintenance of local institutions. Therefore, in construing legislation this court has disfavored inroads by implication on state authority and resolutely confined restrictions upon the traditional power of states to regulate their local transportation to the plain mandate of Congress."

We should also note the following statement of the Court in *Davies Warehouse Company v. Bowles*:[4]

"Simplicity of administration is a merit that does not inhere in a federal system of government, as it is claimed to do in a unitary one. A federal system makes a merit, instead, of the very local autonomy in which complexities are inherent. Nor would the interpretation advocated by the Administrator avoid the necessity of ascertaining and considering rights thought to be possessed under local laws and not likely to be yielded readily. One effect of the Administrator's interpretation would be to postpone study of local laws from consideration in connection with wise administration to the time of litigation, as in this case. Local institutions, customs, and policies will not be overridden without fighting for consideration. The existence and force and function of established institutions of local government are always in the consciousness of lawmakers and, while their weight may vary, they may never be completely overlooked in the task of interpretation. At a time when

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[4] (1944), 321 U. S. 144, 153 (2), 88 L. ed. 635, 642, r. col., 2d par.

great measures of concentration of direction are concededly necessary, it may be thought more farsighted to avoid paralyzing or extinguishing local institutions which do not seriously conflict with the central government's place. Congress has given no indication that it would draw all such state authority into the vortex of the war power. Nor should we rush the trend to centralization where Congress has not. It could never be more appropriate than now to heed the maxim reiterated recently by the Court that "the extension of federal control into these traditional local domains is a 'delicate exercise of legislative policy in achieving a wise accommodation between the needs of central control and the lively maintenance of local institutions.'"

On the other hand, when the United States contracts for the services of a regulated industry and pays, as other purchasers, rates lawfully established by a state, the effect is to stimulate the national economy. The United States then contributes its fair share to the proper maintenance of the regulated industry which cannot afford to take less because of regulation. The result is consonant with the well recognized aims of Federal and State governments to maintain a vibrant national economy.

The latter philosophy of government is conducive to maintaining a strong commercial transportation industry in the United States. General Lasher emphasized the military necessity for such an industry when he testified that:

> "The[5] policy of the Department of Defense is to utilize the commercial transportation industry of the United States to the fullest extent possible."

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[5] *United States v. Public Utilities Commission of State of California* (D. C.—N. D. Cal.—1956), 141 F. Supp. 168, 174, r. col., 2d par.

> "This policy," the witness continued, "has been adopted primarily on the theory that the broader that common carrier base in the United States is, the better prepared transportationwise we will be in the case of emergency, and therefore we utilize military-owned transportation to a minimum extent and only where commercial transport cannot meet the requirements of the particular traffic involved."

In this case, as in *Penn Dairies*, the price regulation affects the United States only by increasing the price it pays. In *Penn Dairies* the Court recognized that the control of prices in the milk industry is clearly within the police power of the states since the public health is so directly affected. In this case, the regulation of rates in the intrastate transportation industry is also clearly within the police power of the states because the adequacy of the industry and its consequent ability to properly serve the general public is directly affected. The economic burden placed on the United States is only incidental to the enforcement of state milk and motor carrier regulations and the increased cost in each case is not one which was expressly made to discriminate against the United States, nor is it one which interferes with the performance of a Federal function.

The United States attempts to distinguish this case and *Penn Dairies* on the ground that in *Penn Dairies* the army could avoid state price regulation by procuring a supply of milk from outside the state, but that such an alternative is unavailable to the Federal government in this case.[8] Such a distinction is irrelevant because obviously it was not a determining factor in the Court's disposition of *Penn Dairies*.

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[8] Jurisdictional Statement, p. 15, lower portion.

In *Public Utilities*, the state had enacted legislation which directly regulated the United States, by name, when it should apply for reduced rates for the transportation of property. The state statute provided that "The (state) commission may permit common carriers to transport property at reduced rates for the United States . . ., to such extent and subject to such conditions as it may consider just and reasonable." The legal effect of such a statute is to place the United States under the heel of the state when applying for reduced rates. This direct interference by a state with the United States was relied on heavily in the decisions of the lower Court and this Court in *Public Utilities*.

By contrast, the Georgia statutes do not name the United States, but operate indiscriminately upon all shippers. The Georgia statutes do not interfere with the United States, but merely impose an indiscriminate incidental economic burden on it.

Next, we should note that in *Public Utilities* the property being transported consisted of military weapons and supplies. The District Court and this Court interpreted the State regulation as interfering seriously with the flexibility, speed and security requirements of moving military property. This is a crucial consideration during the current Cold War when espionage is being conducted in this Country by foreign powers. The opportunity for total war or limited conflict is ever present. Never in our history have the needs of immediate national defense been so synonymous with national survival. Such is the product of the thermonuclear and intercontinental ballistic missile age. Obviously, a State cannot interfere with the United States in the performance of its paramount responsibilities.

By contrast, this case involves the intrastate transportation of the household goods and personal effects of civilian

employees of the United States Department of Public Health. The movements here are remote from the considerations of national defense as compared with the military movements in *Public Utilities*. In this case, the national interest is more concerned with the maintenance of an economically sound commercial transportation system and its effect on the national economy and defense, than with the indiscriminate incidental economic burden placed on the United States. The District Court dramatically illustrated this distinction when it opined that "There is a constitutional difference between a milk can and a hydrogen bomb!"[7]

Furthermore, *Public Utilities* involved the transportation of substantial quantities of exotic military weapons and supplies for which no commodity rates had been devised. Consequently, under the California regulations such military property would have to move under the higher class rates. On the other hand, the vast majority of private property moves at commodity rates because such property involves the common articles of commerce for which commodity rates have been devised. Therefore, the effect of such rate classification by California would impose a substantial economic discrimination against the United States in comparison with private shippers because of the uniqueness of much of the military property transported.

By contrast, this case involves the transportation of household goods and personal effects which are frequent items of commerce throughout the Nation. Georgia, like all the States which regulate the rates for the transportation of property, has devised commodity rates. Conse-

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[7] *United States v. Public Utilities Commission of the State of California* (D. C.—N. D. Cal.—1956), 141 F. Supp. 168, 189, 1 col., 2d par.

quently, the economic burden imposed upon the United States is the same burden imposed upon private shippers.

The *Penn Dairies* doctrine is essential in preserving the vitality of our dual form of government, just as the *Public Utilities* doctrine is essential in prohibiting State interference with the performance of Federal functions. The two doctrines coexist under our Federal constitution. The over-expansion of either doctrine results in debilitating the desired vitality of the governmental victim.

In this case, the Court is called upon to determine which doctrine rules the facts presented. The answer of the Court, while directed to a Georgia factual situation, will have nationwide influence. Consequently, the question presented is one of degree and of balancing national interests.

On one side, we have the interest of preserving and stimulating the economy of the transportation industry which is an indispensable part of the national economy and defense. On the other side, we have an indiscriminate incidental economic burden imposed on the United States, as on other shippers, who avail themselves of an intrastate transportation system. The burden is merely the cost of supporting the system.

The Congressional intent, prior decisions of the Court and the national interest require that this case be ruled by the *Penn Dairies* doctrine.

IX.

CONCLUSION.

The Judgment of the United States District Court for the Northern District of Georgia, sought to be reviewed in this cause, should be affirmed on the ground that it is

manifest that the questions on which the decision of the cause depends are so unsubstantial as not to need further argument. Respectfully submitted,

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The Attorney General,

.....

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APPENDIX.

The following sections are extracted from the California Public Utilities Code:

§ 2107. Residuary penalty.—Any public utility which violates or fails to comply with any provision of the Constitution of this State or of this part, or which fails or neglects to comply with any part or provision of any order, decision, decree, rule, direction, demand or requirement of the commission, in a case in which a penalty has not otherwise been provided, is subject to a penalty of not less than five hundred dollars ($500) nor more than two thousand dollars ($2,000) for each offense (Stats. 1951, c. 764, p. 2098, § 2107).

§ 2110. Violation by officer, agent, or employee of public utility; misdemeanor; penalty.—Every officer, agent or employee of any public utility who violates or fails to comply with, or who procures, aids or abets any violation by any public utility of any provision of the Constitution of this State or of this part, or who fails to comply with any part of any order, decision, rule, direction, demand or requirement of the commission, or who procures, aids or abets any public utility in such violation or non-compliance in a case in which a penalty has not otherwise been provided for such officer, agent or employee is guilty of a misdemeanor and is punishable by a fine not exceeding one thousand dollars ($1,000), or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment (Stats. 1951, c. 764, p. 2098, § 2110).

§ 2111. Penalty for violation by corporation not a public utility.—Every corporation, other than a public utility, which violates any provision of this part, or which fails to comply with any part of any order, deci-

sion, rule, direction, demand, or requirement, of the commission, in a case in which a penalty has not otherwise been provided for such corporation, is subject to a penalty of not less than five hundred dollars ($500) nor more than two thousand dollars ($2,000) for each offense (Stats. 1951, c. 764, p. 2099, § 2111).

§ 2112. Violation by officer, agent or employee of corporation not a public utility; misdemeanor; penalty.—Every person who, either individually or acting as an officer, agent or employee of a corporation other than a public utility, violates any provision of this part, or fails to comply with any part of any order, decision, rule, direction, demand or requirement of the commission, or who procures, aids or abets any public utility in such violation or non-compliance, in a case in which a penalty has not otherwise been provided for such person, is guilty of a misdemeanor, and is punishable by a fine not exceeding one thousand dollars ($1,000), or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment (Stats. 1951, c. 764, p. 2099, § 2112).

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 701

UNITED STATES OF AMERICA, APPELLANT

v.

GEORGIA PUBLIC SERVICE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF FOR THE UNITED STATES IN OPPOSITION TO MOTION TO AFFIRM

In the motion to affirm appellee argues "that the *economic burden* imposed upon the United States [by sections 613 and 614 of the Georgia Motor Vehicle Code] is indiscriminate and incidental" and does not constitute a "direct interference" with the activities of the government (p. 6, italics added; see pp. 11-15). This argument does not meet and in no way contravenes our contention that the Georgia rate-fixing statutes directly conflict with "the federal regulatory scheme providing for negotiation of rates" (J.S. 16) and directly burden the operations of the government by forcing transportation officials to comply "with one set of procedures for handling [goods]

CONCLUSION

Appellee admits that resolution of the problem involved in this case "will have nationwide influence" (motion, p. 4). The district court recognized that the conflict among the courts over whether federal transportation of household goods is governed by *Pyle-Barnes, Inc.* v. *Mill Control Commission*, 318 U.S. 268, or *Public Utilities Commission of California* v. *United States*, 355 U.S. 534, must be resolved by this Court (see J.S. Appx. V, pp. 29-30). Therefore, since the decision below admittedly "raises questions of wide-spread importance in the management of the government's extensive transportation operations" (J.S. 13; footnote omitted), probable jurisdiction should be noted.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

MAY 1962.

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 81

UNITED STATES OF AMERICA, APPELLANT

v.

GEORGIA PUBLIC SERVICE COMMISSION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the district court (R. 92–101) is reported at 197 F. Supp. 793.

JURISDICTION

The judgment of the district court, embodied in its opinion, was entered on October 2, 1961 (R. 101); and a notice of appeal was filed by the United States on November 30, 1961 (R. 102). By orders entered in the district court on January 19, 1962, and February 23, 1962, the time for docketing this case on appeal was extended to and including March 15, 1962 (R. 104, 106). This Court, on May 21, 1962, postponed consideration of the question of jurisdiction

until the hearing on the merits, (R. 206; 369 U.S. 882). The jurisdiction of this Court is invoked under 28 U.S.C. 1253 and 2101(b).

QUESTION PRESENTED

Whether the district court erred in holding that the States of Georgia could constitutionally prohibit motor common carriers from contracting with the United States, for the intrastate transportation of household goods and personal effects of military and civilian personnel of the United States, at rates other than those prescribed by the Georgia Public Service Commission.

STATUTES AND REGULATIONS INVOLVED

Pertinent provisions of the Georgia statutes dealing with the authority of the Georgia Public Service Commission to regulate rates for intrastate transportation by motor common carriers, and the penalties for violations, are set forth in Appendix A, *infra*, pp. 69–70. Pertinent provisions of the federal statutes and regulations applicable to procurement of transportation services generally, and transportation of household goods in particular, are set forth in Appendix B, *infra*, pp. 71–84.

STATEMENT

This is a direct appeal from a judgment of a three-judge district court convened in the Northern District of Georgia. The court granted summary judgment against the United States in an action to enjoin the Georgia Public Service Commission from prohibiting rail and motor carriers from contracting with military and civilian agencies of the federal government for

transportation within Georgia, at rates other than those prescribed by the Commission, of property of United States government personnel. The government contended that the state regulatory system conflicted with the governing federal procurement policy in violation of the Supremacy Clause of the Federal Constitution, and also directly burdened the United States in the discharge of various constitutional powers.[1] The district court held, however, that the state regulations were not in conflict with any federal policy; that they merely imposed a nondiscriminatory economic burden on the federal government; and were therefore constitutional. The relevant facts, which are not in dispute, are as follows:

I. BACKGROUND

The federal procurement statutes and regulations provide the procedures and standards for contracting with carriers for the shipment of property that the United States owns or is under an obligation to transport. No distinction is made in the applicable legislation or the regulations promulgated thereunder between interstate and intrastate shipments (R. 3, 37, 50, 88; see R. 38-47 (Department of Defense directive), 51-66 (General Services Administration regulations), 67-73 (Bureau of the Budget regulations)).

Household goods belonging to military and civilian personnel of the federal government and their dependents constitute a significant part of the property

[1] Transportation for the United States of goods moving in interstate commerce is specifically exempted from the rate regulations of the Interstate Commerce Act by Section 22 thereof, 49 U.S.C. 22.

transported under United States government contracts. The government is required by law to pay the cost of such transportation (5 U.S.C. 73b-1; 37 U.S.C. 253(c); App. B, *infra*, pp. 71–72). Where the transportation of household goods is between two government establishments, military or civilian, it is generally handled by federal transportation officers who make "all the arrangements with the carrier for the crating, packing, pickup, line haul, and delivery of the property. It is shipped on government bill of lading and * * * [t]he carrier is paid by a United States disbursing officer with a government check" (R. 36 (military); see R. 12–13, 47–50 (similar General Services Administration procedure for transferring household goods of civilian personnel)).

Within the State of Georgia there are approximately 25 federal military installations and a number of civil establishments (R. 2, 9, 12). In 1960, about "1,100 Georgia intrastate van carrier shipments" of household goods of members of the armed services moved between these installations (R. 9). These shipments weighed approximately four million pounds and cost the government about $175,000 (*ibid.*).[2] In addition, the cost of shipping the household goods of personnel of civilian governmental agencies between establishments located within the State of Georgia was substantial (R. 2).

[2] Throughout the nation, approximately $400 million is spent each year by the United States to transport the household effects of civilian and military personnel of the Department of Defense (R. 36).

On July 15, 1970, the United States Department of Public Health, Communicable Disease Center of Atlanta, Georgia, requested George D. Krueger, GSA Region IV Director, Transportation and Public Utilities Service, "to negotiate with carriers for the establishment of economical rates and charges to cover a mass movement of household goods and personal effects of Communicable Disease Center employees on transfer from Savannah to Atlanta, Georgia and vicinity" (R. 12). Krueger thereupon issued an invitation to 54 qualified Georgia carriers for bids on a per-hundred-pound basis covering the entire mass movement (*ibid.*). In response, 13 carriers submitted sealed bids: eight quoted rates and charges as published in Georgia Household Goods Tariff No. 1-B, MF No. 3, App. C (see pp. 85-86, *infra*); the remaining five carriers (Nos. 1, 10, 11, 12 and 13 on the GSA Abstract of Bids—R. 15) quoted rates different from those published in that tariff (R. 12-13).

Upon an evaluation of all bids, the carriage contract was awarded to "the lowest responsive bidder," Consolidated Van & Storage Companies, Inc.—one of the five carriers submitting a bid on a basis other than that prescribed by the Commission's tariff (R. 13). Consolidated deviated from the tariff by quoting, as requested by the GSA invitation for bids, a single per-hundred-pound rate for shipping and packing the mass shipment (*ibid.*). The Georgia tariff did not permit quotation of a mass-shipment rate for transporting household goods of more than one family. It provided that "[p]roperty of two or more families or establishments will not be ac-

cepted for transportation as a single shipment" (Georgia Household Goods Tariff No. 1–B, MF No. 3, Section 1, Rule 15, App. C, *infra*, p. 85), and required carriers to quote schedules of approved rates (see *id.*, Sections II, III, pp. 16–20 (as amended), with the total charge to be the sum of the charges figured for individual families, primarily on the basis of the weight of their property (*id.*, Section 1, Rule 8, App. C, *infra*, p. 85).

Several of the unsuccessful bidders complained to the Commission that Consolidated had quoted other than approved rates; the Commission thereupon warned all five carriers whose bids deviated from the tariff that, if they performed at the rates quoted to GSA, the Commission would revoke their intrastate operating permits for violating its rules (R. 13). As a result of this threat, Consolidated, on August 23, 1960, notified GSA that it was defaulting on the contract (R. 13, 18). Unable to obtain carriage at rates other than those approved by the Commission, GSA was thereby compelled to transport the approximately 43,676-pound shipment at the prescribed rates at an increase in cost of about 66⅔% over the charges originally quoted by Consolidated (see R. 26).

Notwithstanding Consolidated's refusal to perform its contract with GSA, the Commission, on Septem-

[1] The actual expense of the shipment was about $2,899.11 (at the time this action was instituted, two families had not yet moved and cost data in the record relating to them are estimates) (R. 26). Transportation at the charges quoted by Consolidated would have cost only approximately $1,738.30—a saving of about $1,160.81 (*ibid.*).

ber 26, 1960, issued a rule *nisi* looking towards revocation of Consolidated's certificate (R. 17-18). An attorney for GSA, as a representative of the United States, appeared at the hearing and petitioned the Commission to allow the United States "to intervene in the proceeding and present evidence" as to the question whether the Commission had jurisdiction "to regulate the rates for shipments by the United States between points in Georgia" (R. 4-5). This petition was denied (R. 5). The Commission also refused to allow Krueger, the GSA official responsible for procurement of the contract, to testify as to the facts and circumstances of the transaction (R. 14).[4]

2. THE PROCEEDINGS BELOW

Faced with this situation, in which carriers were being threatened with loss of their certificates if they submitted bids to the government for interstate movements of household goods at rates other than those prescribed by the State Commission, the United States filed a complaint in the United States District Court for the Northern District of Georgia on March 9, 1961, pursuant to the provisions of 28 U.S.C. 1331, 1345, 2201, 2281 and 2284 (R. 1). The complaint requested the convocation of a three-judge court; recited the background facts previously described as to the federal procurement policy and the conflict with Georgia statutes illustrated by the GSA transaction; and alleged that "[a]s a result of the actions of The

[4] We have been informed that the Georgia Public Service Commission has deferred further proceedings in the *Consolidated* case pending the outcome of the present litigation.

Georgia Public Service Commission as set forth above the carriers in the State of Georgia will not submit competitive bids for the carriage of property for the United States or enter into any contract with the United States for the carriage of property except at rates prescribed by the Commission, and the Commission continues to regulate such rates from day to day" (R. 5). The Georgia statutes, as thus applied, were asserted to be "unconstitutional and void" under the Supremacy Clause because (1) they placed an "unreasonable burden and impediment" upon the exercise by the United States of its constitutional powers under Art. I, Sec. 8, Cls. 7, 12, 13, 16 and 17 and Art. IV, Sec. 3, Cl. 2—provisions authorizing establishment and maintenance of post offices, the army, navy and militia, and the disposition and regulation of federal territory and property; (2) they unreasonably burdened interstate commerce in an area under exclusive congressional jurisdiction under Art. I, Sec. 8, Cl. 3—the Commerce Power; and (3) they contravened the congressional policy "relating to the negotiation for the transporting of property for the United States", citing the Federal Property and Administrative Services Act of 1949 and "the regulations of the various departments and agencies of the United States issued pursuant thereto" (R. 5–6). The complaint sought a judgment declaring that the Georgia statutes are unconstitutional and void insofar as they prohibit carriers from entering into contracts with the United States for the intrastate shipment of government property, and of household effects of government personnel, at rates other than those ap-

proved by the State Commission; and enjoining the Commission from taking any action under such statutes which would prevent the United States and the carriers from entering into contracts with respect to rates for the shipment of such property (R. 6–7).[5]

On April 28, 1961, the Georgia Public Service Commission moved to dismiss the complaint on the ground that the cited Georgia statutes "do not in express terms apply to carriers transporting property for the federal government nor has the Supreme Court of Georgia ever construed these Code Sections as to their applicability to carriers of property for the federal government" (R. 22–23). In its supporting brief the Commission merely reasserted the above allegations of the motion to dismiss. It did not contend that the statutes were on their face ambiguous, nor did it contend that they could or should be interpreted as not applying to the intrastate transportation of goods for the federal government even if the statute would otherwise be inconsistent with the Federal Constitution. In opposition the United States pointed out that the construction of the Georgia statutes advocated by the Commission was in accordance with the advice of the attorney general of the State of Georgia (see R. 79–81, 82–84), that it had never been suggested there was any question as to the applicability of the statutes to the federal government, except the consti-

[5] The complaint (R. 6) also sought an interlocutory injunction which was issued on May 5, 1961, to restrain the Commission from "exercising * * * any jurisdiction over transportation charges for the transportation at the United States Government's request of property of United States Government personnel" (R. 30).

tutional problem raised in the government's suit, and that under these circumstances dismissal of the action or holding it in abeyance pending reference to the state courts could only result in delaying resolution of the question to the detriment of the United States (R. 27–28).

On May 8, 1961, the three-judge district court denied the motion to dismiss stating (R. 32):

> It appearing that the plaintiff sought to intervene in one proceeding before the defendant touching on this question, and that its right to intervene was denied by the defendant, and it not appearing that there is any convenient or prompt or effective means by which the issue here presented can be passed upon by the courts of the state of Georgia, except by the filing of a suit in the Georgia courts by the United States, the motion is hereby DENIED.

On May 17, 1961, the government responded to defendant's motion for a more definite statement of the issues. It stated that, two weeks earlier, it had discovered that the Georgia Commission no longer asserted the power to regulate rates for intrastate shipments of property belonging to the United States, upon the advice of the state attorney general as to the impact of *Public Utilities Commission of California* v. *United States*, 355 U.S. 534 (R. 74–75). Accordingly, the United States restated the issue in the case as whether Georgia could constitutionally regulate the rates for "carriage of the household goods and personal effects of personnel of the United States when the contract is the contract of the United States and the United States assumes the sole responsibility of

paying the carrier for the carriage by the terms of the contract" (R. 75–76).

The defendant on May 31, 1961, filed an answer admitting, with respect to the transportation of household goods, all of the material allegations of the complaint except those relating to the procedures normally followed by the United States in handling such goods, which the answer neither admitted nor denied (R. 87–90). Specifically, the answer admitted the allegation that, as a result of the actions of the Commission, carriers licensed in the State of Georgia would not submit competitive bids except at rates prescribed by the Commission (R. 89). The Commission also admitted "that there is a real controversy between the United States and itself as to the constitutional authority of the defendant in pursuance of the Georgia statutory provisions above cited to regulate the rates which may be charged by carriers for the intrastate carriage of the household goods of the United States military and civilian personnel within the State of Georgia" (R. 89–90).

On the basis of the pleadings and several affidavits of federal military and civilian personnel, the United States filed a motion for summary judgment pursuant to Rule 56(a) of the Federal Rules of Civil Procedure (R. 34). The affidavits generally stated that enforced compliance with state regulation would severely hamper the functioning of the military transportation operation (R. 10, 37) and would "disrupt the existing rate structure applicable on Government traffic" (R. 9). A cross motion for summary judgment was filed by the Commission (R. 91). After

hearing oral argument, the district court, on October 2, 1961, granted summary judgment for the Commission.

3. THE OPINION OF THE DISTRICT COURT

At the outset of its opinion, the district court noted that the Georgia Commission "conceives it to be its duty to prevent carriers from contracting with military or other federal government agencies to carry household goods of individual employees of the United States, when such shipments are wholly within the state of Georgia, at less than the published tariffs" (R. 92).[6] It recognized further that the federal government "has the power, if it elects to exercise it, to prevent any interference by way of state regulatory schemes" with federal activities and that the states cannot directly regulate the performance by federal officials of governmental functions (R. 93). Georgia's regulation of the rates at which the United States may ship the household goods of its personnel within the state could only be upheld, the court concluded, if it constituted a nondiscriminatory regulation that only "to some degree affect[ed] either the cost of the government's operation within the state or increase[d] difficulties touching on such operation" (R. 93–94). Thus, the issue presented was defined as whether "the

[6] The court stated that, "No issue is presented touching on the right of the Commission to regulate the rates charged by Georgia carriers for the carriage of strictly governmental property" because the Commission had conceded that the decision in *Public Utilities Commission of California* v. *United States*, 355 U.S. 534, "foreclosed" this question "in favor of the United States" (R. 92).

Georgia laws place a direct prohibition on the agencies of the federal government, or, if not, whether the federal laws authorizing the transportation in question impliedly prohibit inconsistent regulations" (R. 94). Resolution of this issue, in the court's view, required a determination of whether, on the facts here, the case was controlled by *Public Utilities Commission of California* v. *United States*, 355 U.S. 534, striking down state regulation of transportation rates charged the United States, or *Penn Dairies, Inc.* v. *Milk Control Commission*, 318 U.S. 261, sustaining state regulation of milk prices charged the United States (R. 96). Disagreeing with the basis on which this court in *California Commission* distinguished *Penn Dairies* (R. 96-97), the district court concluded that the only true distinction between the cases lay in "the difference in the character of the commodities dealt with"—"military goods" in *California Commission*, "milk" in *Penn Dairies* (R. 98).[7] It recognized that "there is less of a prohibition on the national government where a state [California] says it may negoti-

[7] The reasoning of the district court was as follows: This Court's holding in *Penn Dairies* was based on its finding that the State statute "imposes no prohibition on the national government or its officers" (R. 94); and this Court's distinction of *Penn Dairies* in *California Commission* rested upon a finding that the applicable California statute "places a prohibition on the federal government", citing criminal penalties applicable to shippers (R. 96-97). The district court asserted, however, that both the Pennsylvania and California statutes involved in those cases had criminal penalties applicable to the purchaser or shipper as well as the seller. The court below was therefore "just not able to conclude that the Supreme Court, in the California case, found any distinguishing characteristic here" (R. 97-98). The district court then

ate contracts if its (*sic.*) requests and obtains permission to do so, than where a state, like Pennsylvania and like Georgia, flatly says it may not negotiate at all" (R. 97). Nevertheless, the court ruled that "[s]ince the shipment of household goods * * * does not present the unique and difficult problems encountered when military supplies are involved" (R. 100), the decision in *Penn Dairies* was dispositive of this case.[7]

SUMMARY OF ARGUMENT

I

A. The Court has jurisdiction of this direct appeal under 28 U.S.C. 1253. Direct appeal lies under that section from a suit "required to be heard by a district court of three judges." Thus, the sole question is whether the three-judge court below was properly convened under 28 U.S.C. 2281.

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devised the distinction stated in the text, between the commodities involved.

The district court's statement of the applicable Pennsylvania and California statutes was erroneous, see *infra*, fn. 27a, p. 53. The court also ignored an additional ground given in *California Commission* for distinguishing *Penn Dairies*, that the Pennsylvania statute had been found not to conflict with federal procurement policy while, in California, "the conflict between the federal policy of negotiated rates and the state policy of regulation of negotiated rates seems to us to be clear." 355 U.S. at 544.

[8] The court qualified this choice when it stated (R. 100): "Assuming that the Penn Dairies case still stands as a precedent, as we must, we are compelled to conclude that the Georgia Public Service Commission can legally do what the Georgia statute says it can do. If our assumption of the continuing vitality of Penn Dairies is incorrect it must remain for the Supreme Court to say so."

A three-judge court is required, under Section 2281, to adjudicate substantial claims of "unconstitutionality" of state law based upon either (1) direct contravention of constitutional provisions limiting state power or delegating power to the federal government, or (2) violation of the Supremacy Clause through conflict with federal legislation, when the alleged conflict presents "a sole, immediate constitutional question" of federal supremacy without preliminary "issues of statutory construction." *Kesler* v. *Department of Public Safety*, 369 U.S. 153, 158.

The complaint in this case alleged that the Georgia statutes providing for regulation of intrastate motor carrier rates were "unconstitutional and void" as applied to transportation for the United States on the grounds, *inter alia*, that (1) they burdened the exercise by the United States of its powers to maintain the armed services, to regulate federal territory and property, and to carry out other constitutional functions and (2) they contravened the procurement policy established by federal statutes and regulations. A substantial issue was presented by the first alleged ground of unconstitutionality (which did not involve any claim of conflict with federal legislation) both initially, when the controversy included state regulation of rates for transportation of property owned by the United States, and as finally adjudicated, when the complaint was limited to regulation of rates for the transportation of household goods of government personnel moved under government contracts. Accordingly, a three-judge court was required to adjudicate it, and this Court need not reach the question

whether the three-judge court was properly convened to decide the Supremacy Clause question.

B. Not only is this case within the jurisdiction of the Court, but it is clearly one in which such jurisdiction should be exercised. There is no unsettled question or ambiguity of state law here, resolution of which might avert the constitutional issue and suggest abstention in favor of state litigation. The applicability of the state law to transportation for the United States is clear and the only real controversy is the existence of constitutional limitations. Therefore, there is no reason for the federal courts to defer to the Georgia tribunals.

II

A. The federal policy governing procurement of transportation services and its impact upon state regulation—were considered by this Court four years ago in *Public Utilities Commission of California* v. *United States*, 355 U.S. 534. That case involved a suit by the United States to enjoin the enforcement—as applied to shipments by the federal government—of a California statute which authorized a state commission to fix rates for intrastate transportation by common carriers, and which permitted regulated carriers to charge reduced rates to the United States only (p. 535) "'to such extent and subject to such conditions as [the state commission] may consider just and reasonable.'"

This Court examined the "comprehensive policy governing procurement" established by Congress, and the implementing regulations (p. 540). Citing, *inter*

alia, regulations directing choice of "the least costly means of transportation", negotiation for "adjusted or modified rates" for "volume shipments", and negotiation to avoid "excessive" or "unreasonable" rates (p. 542), the Court concluded (pp. 542-543) that "these regulations—which have the force of law [citations omitted]—sanction the policy of negotiating rates for shipment of federal property and entrust the procurement officers with the discretion to determine when existing rates will be accepted and when negotiation for lower rates will be undertaken". That decision thus definitively construed the federal procurement laws governing military traffic as establishing a federal policy of freely contracting for transportation services at economical rates.

The military procurement statutes (10 U.S.C. 2301-2314) involved in *Public Utilities Commission of California* remain in effect as the basic provisions for all procurement of supplies and services by the armed services, and the present regulations continue the same policy found in that case of freely contracting for transportation services at lower than current rates. Thus, these regulations provide, *inter alia*, that local transportation officials are to "be constantly alert to identify opportunities for rate negotiations" in situations where the government will pay the transportation charges of a "planned volume movement", and are to transmit to the Executive Director certain specified information on any shipment as to which they believe the "rating is unreasonable", so that negotiations for a revision can commence. Specifically as to movements of house-

hold goods, the policy of the armed services, as expressed in a Department of Defense Directive (R. 38–47), is "to assure high quality service to military and civilian personnel of the Department of Defense in the transportation of their household goods at the lowest over-all cost to the Government" (R. 39).

Procurement by nondefense agencies, insofar as here pertinent, is carried out under the authority of the General Services Administration. The basic statutory provisions (41 U.S.C. 251–260) are substantially similar to the armed services procurement provisions and were enacted to extend to GSA the principles of armed services procurement. The pertinent nondefense regulations are likewise similar to the military regulations and establish a policy of freely contracting for transportation services at economical rates. For example, as to movements of household goods, the regulations provide, *inter alia,* for use of government bills of lading, under which the United States "assumes responsibility for dealings with carriers, including negotiating rates, selecting carriers, and auditing and paying transportation vouchers", whenever "actual transportation charges will be substantially below the amounts which the Government would be required to pay" if it merely reimbursed transferred personnel for having their goods transported individually (R. 71).

B. In *Public Utilities Commission of California* v. *United States*, 355 U.S. 534, this Court invalidated a California statute regulating intrastate motor carrier rates, insofar as it applied to transportation for the United States. The Court held that "the conflict be-

tween the federal policy of negotiated rates and the state policy of regulation of negotiated rates seems to us to be clear" (p. 544). The same result is required in this case.

The federal procurement policy entrusts "procurement officers with the discretion to determine when existing rates will be accepted" (355 U.S. at 543), requires solicitation of rates lower than generally applicable ones if these are unreasonable, and provides in detail for the use of public bidding and negotiation to obtain favored treatment reflecting the volume of the government's shipment. The Georgia statute prohibits both federal procurement officers and state carriers from either agreeing upon a rate lower than the generally applicable one prescribed by the Georgia Public Service Commission or arranging for mass shipments of the property of more than one family. The conflict between the federal policy of freely contracting for the lowest overall rates and state regulation of rates is thus, as in *Public Utilities Commission of California*, "as clear as any that the Supremacy Clause, Art. VI, cl. 2, of the Constitution was designed to resolve" (355 U.S. at 544), and the Georgia statute must give way.

III

Even apart from the effects of the federal statutes and regulations, the Georgia rate regulation is unconstitutional because it violates the United States' inherent constitutional immunity from State regulation. Two rules for determining the scope of this immunity are well settled. First, a State may not directly regulate or tax the property, instrumentalities or

activities of the United States. Second, the fact that nondiscriminatory State taxation or regulation of one doing business with the United States may impose an increased economic burden upon the United States is not alone enough to give the contractor immunity from taxation or regulation.

One elaboration of the first rule is firmly established and clearly applicable to the present case. A State may neither address a command to nor impose a tax upon the officers and agents of the United States when they are acting in the course of their constitutional powers. Here Georgia's statute, by its terms, imposes criminal sanctions upon any government procurement officer who fails to comply with Georgia's directions as to what terms the federal government may offer and solicit in obtaining transportation services.

We do not stand on this ground of unconstitutionality alone. A State may not tax or regulate the activities of the federal government even if its command is not, as in the present case, verbally addressed to a class including the United States and its agents. It is the activities of the United States—including the exercise of its power to contract—which must be free of direct State interference. A State may not regulate the terms of a transaction by which the United States obtains services or supplies regardless of whether the State's command is addressed to a federal procurement officer or takes the form of a restriction on the contracting powers of all the potential sellers of goods or services to the United States.

This immunity of the transactions of the United States from State regulation or taxation is supported

by the prior decisions of this Court as well as by the reasons underlying the prohibition against State regulation or taxation addressed to the federal government itself.

A. Justice Bradley's statement in *Railroad Co.* v. *Peniston*, 18 Wall. 5, 41–42 that a contract "is the means employed for carrying into execution the powers of the government" and therefore "is exempt from taxation or other interference by the State government" has never been rejected by this Court and was indeed repeated with approval in the leading case of *James* v. *Dravo Contracting Co.*, 302 U.S. 134, 155. This doctrine has been squarely applied in cases involving sales taxes which are in terms addressed only to the seller and not to the federal government but which have nevertheless been held to violate a line of decisions that "consistently prohibit taxes levied on the * * * purchases of the Government itself." *Kern Limerick, Inc.* v. *Scurlock*, 347 U.S. 110, 123. There is no ground for distinction between a tax upon sales which the seller is required to collect from the buyer and a State law fixing the price which the seller is required to collect.

B. It is equally clear that the three dominant reasons for the immunity of the United States from State regulation or taxation addressed to the federal government or its agents, also support the proposition that a State may not directly regulate the terms of the contracts of the United States.

First, only unseemly and harassing conflicts could result from the recognition of a State's capacity to regulate the exercise of powers entrusted to the United States by the Constitution. Here Georgia has

frankly asserted the power to dictate the terms in contracts of the United States for transportation of household goods by forbidding every intrastate carrier from agreeing to a rate below that set by the Georgia Public Service Commission or accepting the property of more than one family as a single shipment. Regulation of the terms which private parties may put into contracts with the United States is regulation of the terms for which the United States may contract.

Second, regulation of the transactions of the United States, no less than regulation of its other activities, is likely to impede the performance of federal functions. In the present case a significant administrative burden would fall upon federal procurement officials if they were required to comply with State rate regulation. In a case such as *Public Utilities Commission of California* v. *United States*, *supra*, the burden would be such as actually to imperil the nation's defense efforts. But the controlling principle—freedom of the United States from interference with the exercise of its contracting powers—does not depend upon an assessment of the degree of interference in every case. Interference to some significant degree is inherent in any attempt by a State to regulate the terms of a federal contract just as it is inherent in State regulation of the official activities of federal officers. In both cases it is constitutionally forbidden.

Finally, the prohibition of State taxation addressed to the federal government is intended to draw a line which at once protects the United States from any State's attempt to write a check on the federal treas-

ury and yet does not grant an unwarranted immunity to an ever-increasing class of State residents who happen to have done business with the United States rather than with some other purchaser of goods or services. Where the tax is imposed upon a contractor, the ultimate incidence of the economic burden is, at best, uncertain. Recognition of a constitutional immunity may as easily result in a windfall to the contractor as in protection of the United States from becoming the intended source of State revenue. But when the tax is upon the United States, the immunity exists, for its recognition gives no special privilege to private citizens and, without it, each State would be free to raise its revenue at federal expense.

Georgia's price regulation, like a tax upon federal property or privileges, is intended to make use of the federal treasury to increase the return to Georgia's carriers. Georgia is attempting to fix the exact burden which must be borne exclusively by the federal government for the benefit of Georgia residents. This imposition, which is unnecessary to protect valid State interests and which, like a direct tax, opens the federal treasury to State uses, is for these reasons, too, unconstitutional.

ARGUMENT

I

THE COURT HAS JURISDICTION OF THIS DIRECT APPEAL FROM THE THREE-JUDGE COURT, WHICH WAS PROPERLY CONVENED

In its order of May 21, 1962 (R. 106), the Court postponed a determination of jurisdiction and directed the parties "to brief and argue, in addition

to the merits, the question of this Court's jurisdiction on direct appeal under 28 U.S.C. § 1253; see 28 U.S.C. § 2281; cf. Kesler v. Department of Public Safety, 369 U.S. 153, 155–158." The condition of direct appeal under 28 U.S.C. 1253 is that the suit be one "required * * * to be heard * * * by a district court of three judges". The question thus raised is whether the three-judge court below was properly convened under 28 U.S.C. 2281—that is, whether the government's suit was brought to enjoin the enforcement of a Georgia statute on "the ground of the unconstitutionality of such statute," within the meaning of that section.

A. The "unconstitutionality" of State law for the purpose of 28 U.S.C. 2281 may be asserted in two ways. First, it may be claimed that State law directly contravenes constitutional provisions limiting state power (*e.g.*, Art. I, Sec. 10; the Fourteenth Amendment) or delegating power to the federal government (*e.g.*, Art. I, Sec. 8). It is undisputed that if such a claim is substantial, a three-judge court is required to adjudicate it. *Idlewild Bon Voyage Liquor Corp.* v. *Epstein*, 370 U.S. 713; *Florida Lime & Avocado Growers, Inc.* v. *Jacobsen*, 362 U.S. 73. Second, it may be claimed, as in *Kesler* v. *Department of Public Safety*, *supra*, that a State law conflicts with federal legislation and hence violates the Constitution through the provision of the Supremacy Clause (Article VI, clause 2) that "the Laws of the United States" as well as "[t]his Constitution", "shall be the supreme Law of the Land". In *Kesler*, the Court, in an opinion by Justice Frankfurter, held that a three-judge court was re-

quired when the alleged conflict between federal and State statutes presented "a sole, immediate constitutional question" of federal supremacy without preliminary "issues of statutory construction" (369 U.S. at 158). Dissenting, Chief Justice Warren (joined on this point by Justice Stewart) urged that conflicts of federal and State legislation do not involve a claim of "unconstitutionality" within 28 U.S.C. 2281.

The complaint in the instant case alleged grounds of unconstitutionality which brought the case under the first head of jurisdiction for a three-judge court without the necessity of considering the second." [9]

The complaint alleged that the Georgia statutes providing for regulation of intrastate motor carrier rates by the State Public Service Commission were unconstitutional and void because they burdened the exercise by the United States of its powers to maintain the armed services, to regulate federal territory and property, and to carry out other constitutional functions. This ground of attack upon the Georgia stat-

[9] The introductory phrase of Para. VI alleged that the Georgia statutes were "unconstitutional and void under Article VI, Section 3, Clause 2", (the Supremacy Clause) on the three grounds cited. The Supremacy Clause is, of course, involved when State law directly conflicts with another constitutional provision or with federal legislation since that clause is necessary to make both "[t]his Constitution" and "the Laws of the United States" superior to State law. However, direct conflict with other constitutional provisions (the first two grounds alleged in Para. VI) does not present the issue of the *Kesler* case. The *Kesler* language, "invalidation * * * by virtue of the Supremacy Clause" (369 U.S. at 156), is limited to conflicts with federal statutes in which the Supremacy Clause is the only constitutional provision involved.

utes did not involve any claim of conflict with federal legislation; it relied directly upon the implied constitutional immunity. Furthermore, the claim obviously presented a substantial issue, both as originally filed when the controversy included Georgia's assertion of power to regulate rates for transportation of property owned by the United States (R. 5–6, 29) and as subsequently limited to transportation of household goods and personal effects of government personnel on government contracts (R. 75–76). The court below in effect so acknowledged. It noted that the State could not constitutionally regulate federal officials in the performance of their governmental functions (R. 93). And it expressly posed as a constitutional issue—besides the conflict of statutes—"whether the Georgia laws place a direct prohibition on the agencies of the federal government" (R. 94). We believe the district court answered this question erroneously, as shown in Point III, *infra*. On this ground, a three-judge court was required, even if the constitutional question were joined with issues under the Supremacy Clause not involving "unconstitutionality" within the meaning of 28 U.S.C. 2281.[10] This

[10] Once the three-judge court was thus convened, the case would be properly brought here on direct appeal even if the decision below—and the appeal—rested on nonconstitutional grounds. *Florida Lime & Avocado Growers, Inc.* v. *Jacobson*, 362 U.S. at 80–81, 84–85 (opinion of Court), 89–90 (dissent); *Railroad Comm'n of California* v. *Pacific Gas & Electric Co.*, 302 U.S. 388, 391; *Sterling* v. *Constantin*, 287 U.S. 378, 393–394.

On this record, we do not claim that a sufficiently substantial question was presented by the complaint's second alleged ground of unconstitutionality, burden on interstate commerce, to warrant a three-judge court.

was the holding of *Florida Lime & Avocado Growers, Inc. v. Jacobsen*, 362 U.S. 73, where this Court stated (at 85):

> Where a complaint seeks to enjoin a state statute on substantial grounds of federal unconstitutionality, then even though unconstitutional grounds of attack are also alleged, we think the case is one that is "*required* by * * * Act of Congress to be heard and determined by a district court of *three* judges." 28 U.S.C. § 1253. (Emphasis added.) We, therefore, hold that we have jurisdiction of this direct appeal.

B. Not only is this case within the jurisdiction of the Court, but it is clearly one in which such jurisdiction should be exercised. There is no unsettled question or ambiguity of State law, the resolution of which might avert the constitutional issue and hence suggest abstention in favor of State litigation. By its terms Georgia law purports to cover intrastate motor transportation for the United States; it applies to all "rates, fares and charges for transportation by motor common carriers of passengers, baggage and property" (Ga. Code Ann., Sec. 68–613, App. A, p. 69). Although defendant unsuccessfully moved to dismiss on the ground that the State supreme court should construe the state law,[11] it has not suggested any possible limitation upon the jurisdiction of the Georgia Commission other than

[11] The Georgia Commission's belief that there is no issue of state law is further demonstrated by its actions in denying the United States permission to intervene in its proceeding to discipline a carrier for bidding on the invitation of the United States, and in deferring such proceeding pending the outcome of this litigation on the constitutional issue.

that commanded by the Federal Constitution. In its answer, the defendant Commission acknowledged that it asserted the power to regulate rates for intrastate carriage of household goods of military and civilian personnel of the United States, and that it ceased claiming similar power over property owned by the United States only upon the advice of the Georgia attorney general in 1958 that it lacked authority (R. 88–89). The cited 1958 opinion of the State attorney general (R. 82–84), as well as his 1954 opinion, sustaining broader State authority prior to *Public Utilities Commission of California* v. *United States*, 355 U.S. 534 (R. 77–81), dealt only with interpretation of the Federal Constitution and decisions of this Court. The Commission further admitted that there is a "real controversy" between the parties "as to the constitutional authority of the defendant" to regulate the rates at issue (R. 89-90).

When the applicability of the state law is clear, and the only "real controversy" is the existence of constitutional limitations, there is no basis for the federal court to stay its decision. *Chicago* v. *Atchison, T. & S.F. Ry.*, 357 U.S. 77, 84; *Toomer* v. *Witsell*, 334 U.S. 385, 392, n. 15. "Though never interpreted by a State court, if a State statute is not fairly subject to an interpretation which will avoid or modify the federal constitutional question, it is the duty of a federal court to decide the federal question when presented to it." *United States* v. *Livingston*, 179 F. Supp. 9, 12–13 (E.D.S.C.), affirmed *per curiam*, 364 U.S. 284 (immunity of United States from state taxation); *Allegheny County* v. *Frank Mashuda Co.*, 360 U.S. 185, 196; *Quicy* v. *United States*, 316 U.S. 486, 490.

II

THE GEORGIA RATE-FIXING STATUTES ARE INCONSISTENT WITH THE FEDERAL STATUTES AND REGULATIONS GOVERNING PROCUREMENT OF TRANSPORTATION SERVICES AND CANNOT BE CONSTITUTIONALLY APPLIED TO CONTRACTS OF THE UNITED STATES FOR TRANSPORTATION OF HOUSEHOLD GOODS OF UNITED STATES GOVERNMENT PERSONNEL.

Two separate issues are involved in determining the validity of Georgia's attempt to regulate the price at which the United States can obtain transportation of household goods. First, there is the question whether the federal statutes and regulations which describe the procedures for the procurement of transportation services are inconsistent with Georgia's regulation of the rates of intrastate carriers who are serving the United States. The second issue, which need only be reached if the first is decided against the United States, is whether, even aside from the web of federal directives surrounding government procurement, the Constitution itself forbids Georgia's type of regulation of federal procurement of transportation services. We shall deal first with the issue of federal statutory preclusion of state rate regulation.

Two subsidiary questions are involved in a determination that a certain type of state regulation is precluded by a federal regulatory scheme. First, the court must decide what is the scope and purpose of the applicable federal statutes and regulations. Second, it must determine whether the application of the state law so conflicts with the federal policy

as to warrant requiring the state law to give way. In *Public Utilities Commission of California* v. *United States*, 355 U.S. 534, this Court authoritatively determined: (1) the intended scope of almost identical provisions of federal law and (2) the effect upon such federal law of a state scheme of regulated transportation rates like that adopted by Georgia. The Court concluded that "the conflict between the federal policy of negotiated rates and the state policy of regulation of negotiated rates" was "as clear as any that the Supremacy Clause, Art. VI, cl. 2, of the Constitution was designed to resolve." 355 U.S. at 544. The same result is required here.

A. FEDERAL POLICY RELATING TO THE PROCUREMENT OF TRANSPORTATION SERVICES

The similarity between the federal statutory provisions and regulations applicable to the present case and those applicable in *Public Utilities Commission of California, supra,* can best be indicated by describing each in sequence.

1. The Federal statutory and regulatory scheme presented in Public Utilities Commission of California v. United States, 355 U.S. 534

In *Public Utilities Commission of California* v. *United States*, 355 U.S. 534, this Court ruled that the interlocking federal statutes and regulations governing federal procurement of transportation services were intended to be, not merely a set of recommended procedures for federal officials to employ within the context of State customs and laws, but a pervasive

and uniform procedural framework for the federal purchase of goods and services regardless of conflicting State laws. The Court's conclusion is developed at 355 U.S. 540–543.

The Court first stated that in the controlling statutes "Congress has provided a comprehensive policy governing procurement" (at 540) with competitive bidding the general rule and negotiated purchase or contract the exception to be available in several enumerated situations. In the more specific regulations "promulgated to carry out these statutory provisions" (at 542) in the field of transportation, the Court noted three indications that the federal procurement procedures were intended to provide an exclusive framework for the negotiation of rates without regard to State law: (1) provision for the careful determination of the reasonableness of current rates for the government's "volume shipments" and, "when appropriate, for negotiation of adjusted or modified rates"; (2) declarations that the least costly adequate means of transportation will be chosen; and (3) stipulations requiring negotiation for lower or more equitable rates whenever currently effective rates were determined to be unreasonable or excessive.

From these indications of a comprehensive regulatory scheme directed at obtaining transportation at the lowest available cost by means of review of the reasonableness of existing rates and negotiation to obtain modification of excessive rates (for example, to force recognition of the cost savings of the govern-

ment's large-volume shipments), the Court concluded that (355 U.S. at 542–543):

> It seems clear that these regulations—which have the force of law, *Leslie Miller, Inc.*, v. *Arkansas*, 352 U.S. 187; *Standard Oil Co.* v. *Johnson*, 316 U.S. 481—sanction the policy of negotiating rates for shipment of federal property and entrust the procurement officers with the discretion to determine when existing rates will be accepted and when negotiations for lower rates will be undertaken.

Obviously, "negotiations for lower rates" implies rates arrived at without regard to State law.

2. *The federal statutes and regulations now applicable to shipments of household goods by the United States*

(a) Military procurement law

The statutes in effect at the time of the *Public Utilities Commission of California* case are still the basic provisions for all procurement of supplies and services by the armed services[12] and, as we shall show, the underlying regulations are also substantially the same. See 70A Stat. 127–133, 10 U.S.C. 2301–2314.[13] The statutes contemplate that most contracts will be placed by competitive bidding, in which event the award is to be granted "to the responsible bidder whose bid * * * will be the most advantageous to the

[12] The armed services carry out statutory responsibilities to transport (or pay for the transportation of) the household effects of permanently transferred military personnel and civilian employees of the Defense agencies (R. 36; 5 U.S.C. 73b–1(a); 37 U.S.C. 253(c), App. B, pp. 71–72). In terms, the armed services procurement provisions cover the procurement of "all services" for which the armed services are responsible (10 U.S.C. 2303(a)).

[13] See also, *Leslie Miller, Inc.* v. *Arkansas*, 352 U.S. 187; *Standard Oil Co.* v. *Johnson*, 316 U.S. 481, 484.

United States, price and other factors considered." 10 U.S.C. 2305(c), App. B, p. 73. Procurement may also be carried out by negotiation without advertising in various situations including, among others, where the public exigency will not allow delay, where it is impracticable to obtain competition and where bid prices are determined to be unreasonable or not to have been reached independently in open competition. 10 U.S.C. 2304(a)(2) (10), (15), App. B, p. 72;[14] see *Public Utilities Commission of California* v. *United States*, 355 U.S. at 540–541 and n. 3; S. Rep. No. 571, 80th Cong., 1st Sess., pp. 2, 3–4, 13; H. Rep. No. 109, 80th Cong., 1st Sess., pp. 3, 6.

These statutes and the regulations thereunder apply not only to the carriage of property owned by the government but also to the transportation of the household effects of government personnel.

The Army, Navy and Air Force regulations involved in *Public Utilities Commission of California* were superseded in March 1958 by the Military Traffic Management Regulation (App. B, pp. 76–81),[15] but

[14] As stated in the Senate Report on the Armed Services Procurement Act of 1947, the purpose of the latter provision was "to break collusive bidding, follow-the-leader pricing, rotated low bids, identical bids requiring drawing of lots, uniform estimating systems, refusal to classify the Government as other than a retail buyer regardless of the quantity purchased, and similar practices." S. Rep. No. 571, 80th Cong., 1st Sess., p. 4. The present military procurement statute is a recodification, without substantial change, of the Armed Services Procurement Act of 1947. See S. Rep. No. 2484, 84th Cong., 2d Sess., pp. 19, 20–21.

[15] The regulation was promulgated by orders of the Secretaries of the Army (AR 55-355), Navy (OPNAV INST 4600.8), and Air Force (AFM 75-2). The heads of the Defense

their substance, so far as now relevant, is unchanged. The expressed purpose of the new regulation is to provide policy guidance as to traffic management "functions regarding the effective and economical procurement and use of commercial freight and passenger transportation service by the military" (¶10100I, App. B, p. 76). It further states, in language almost identical to that of an Army regulation cited in *Public Utilities Commission of California* v. *United States*, 355 U.S. at 542, "In the selection of commercial carriers, the means of transportation selected will be that which produces the lowest overall cost consistent with military requirements, the objectives of governing procurement regulations and the transportation policies as expressed by Congress * * *, contingent upon carrier ability to provide safe, adequate, and efficient transportation" (¶102003, App. B, p. 77).

To effectuate these policies the regulation authorizes the Executive Director of the Military Traffic Management Agency ("MTMA") [16] to determine the

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Department and the other departments comprising the Defense establishment are statutorily authorized to prescribe regulations to carry out their duties. 5 U.S.C. 22 (Secretary of Defense); 10 U.S.C. 3012(g) (Secretary of the Army), 6011 (Secretary of the Navy), 8012(f) (Secretary of the Air Force).

[16] The establishment of the MTMA was authorized by the Department of Defense on May 1, 1956, to coordinate the traffic management functions of all three services, in order "[t]o provide the most effective and economical freight and passenger transportation service for the Armed Services from commercial transportation companies." DOD Directive No. 5160.14, 21 Fed. Reg. 4355. The Defense Traffic Management Service succeeded to the functions of MTMA on January

"proper freight classification, rates, charges, rules and regulations on military traffic," to negotiate with carriers or their rate-making agencies as to "rates" and "charges" (¶201001 (a), (b), App. B, p. 77), and to receive all voluntary or negotiated rate tenders relative to "[a]djustment of tariff provisions" and "[s]pecial arrangements pertaining to other freight traffic" (¶201001(k) (6), (7), App. B, p. 78). Local transportation officials are ordered to "be constantly alert to identify opportunities for rate negotiations" in situations where the government will pay the transportation charges of a "planned volume movement" (¶201005, App. B, p. 78), and are to transmit to the Executive Director certain specified information on any shipment as to which they believe the "rating is unreasonable" (¶201006(2), App. B, p. 79), so that negotiations for a revision can commence.[1]

Thus the new Military Traffic Management Regulation continues in effect the provisions of the former Army, Navy, and Air Force Regulations designed to assure the lowest possible overall cost by bringing the technique of negotiation to bear whenever either the volume of the government shipment or a review of the reasonableness of applicable rates indicates to the responsible government official that these rates are excessive. The effectuation of this purpose may be observed even more clearly in the regulations designed

1, 1962, and presently performs traffic management functions for all three services. DOD Directive No. 5105.22, November 6, 1961.

[1] Compare the similar Navy and Air Force regulations cited in *Public Utilities Commission of California* v. *United States*, 355 U.S. at 542.

specifically to govern the movement of household goods.

Two basic documents embody the controlling provisions for this type of shipment. Department of Defense Directive No. 4500.27, July 1, 1960 (R. 38–47), was intended "to assure high quality service to military and civilian personnel of the Department of Defense in the transportation of their household goods at the lowest over-all cost to the Government" (R. 39). The directive provides that "[o]nly those carriers shall be used" which satisfy certain enumerated requirements "at the lowest over-all cost to the Government" (R. 41). It directs implementation by the fixing of "standards, formulae, and procedures for determining the lowest over-all cost" (R. 44) and by "[n]egotiating with commercial carriers and operators on all matters incident to the transportation of household goods" (R. 45).

Chapter 217 of the Military Traffic Management Regulation also deals specifically with movements of "uncrated household goods of military and civilian personnel of the Department of Defense * * * when the transportation is procured and arranged by an agency of the Department of Defense" (¶217001, App. B, p. 80).[18] The Executive Director of MTMA

[18] Insofar as the military regulations deal with transportation of household goods of civilian employees (as distinguished from military personnel), they represent the Defense Department's implementation of the governing regulations of the Bureau of the Budget which are described more fully in the discussion of nondefense procurement, *infra*, pp. 40–43. Chapter 217, as dated August 19, 1960, was in effect at the time of the proceeding in the court below. The present chap-

is made responsible, *inter alia*, for "[a]ccepting tenders of service from commercial carriers of household goods, reviewing such tenders and approving or disapproving carriers for use by military installations," and "[n]egotiating special tenders, agreements, or arrangements with commercial carriers for the movement of household goods" (¶217004(e), (f), App. B, p. 81). Provision is made for "[s]pecial tenders of rates or charges, either of individual carriers or tariff publishing agents" (¶217010, App. B, p. 81). Finally, under "Distribution of Traffic and Selection of Carrier" the chapter states, "Only those carriers shall be used which provide high quality service at the lowest overall cost to the Government" (¶217012, App. B, p. 81).

(b) Procurement by non-defense agencies

The same "policy of negotiating rates for shipment of federal property" and of entrusting "the procurement officers with the discretion to determine when existing rates will be accepted and when negotiation for lower rates will be undertaken" which the Court observed in the *California Commission* case (355 U.S. at 543), and which has been continued in the statutes and regulations dealing with military shipments, emerges with equal clarity from a review of the federal statutes and regulations governing procurement by non-defense agencies. Again, as in the case of military shipments, the regulations emphasize the objectives of volume savings and modifying rates which the

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ter, as amended to date February 23, 1962, is not significantly changed.

elements of federal policy which led the Court in the

procurement agency deems unreasonable, by negotiation as well as by competitive bidding. It was these *Public Utilities Commission of California* case to hold that the federal provisions furnished a comprehensive and exclusive framework for the procurement of transportation services.

Procurement by non-defense agencies, insofar as here pertinent, is carried out under the authority of the General Services Administration. The basic statutory provisions are in the Federal Property and Administrative Services Act of 1949, 63 Stat. 393–397, as amended, 41 U.S.C. 251–260. They are substantially similar to the military procurement provisions discussed *supra*, pp. 32–33, and were, in fact enacted to extend to GSA "the principles of the Armed Services Procurement Act of 1947, with appropriate modifications principally designed to eliminate provisions applicable primarily to the military." H. Rep. No. 670, 81st Cong., 1st Sess., pp. 6, 20; S. Rep. No. 475, 81st Cong., 1st Sess., p. 5.[19]

[19] Thus, under the Federal Property and Administrative Services Act of 1949, as under the armed services procurement provisions, advertising for bids is the general practice, and contracts are to be awarded "to that responsible bidder whose bid * * * will be most advantageous to the Government, price and other factors considered." 41 U.S.C. 253(b), App. B, p. 74. Negotiation is also authorized in various instances, including where the public exigency will not admit of delay, where it is impracticable to obtain competition and where bid prices received are not reasonable or have not been independently arrived at in open competition. 41 U.S.C. 252(c)(2), (10), (14), App. B, pp. 73–74; see S. Rep. No. 475, 81st Cong., 1st Sess., p. 24. The authority to negotiate where it is impracticable to obtain competition "places upon the agency concerned the maximum responsibility for decisions as to when it is impracticable. It

Acting pursuant to his authority to "prescribe such regulations as he deems necessary to effectuate his functions" (40 U.S.C. 486(c)), the General Services Administrator has promulgated numerous regulations dealing with procurement, including specific provisions relating to the transportation of household goods. He has delegated authority to administer and formulate policies for procurement of transportation services to GSA's Transportation and Public Utilities Service ("TPUS"), including specific responsibility (ADM 5450.3, Change 4, ¶41, App. B, p. 83; emphasis added):

> for the representation of executive agencies in negotiations of rates and contracts for transportation * * * services * * *; for the provision of technical advice and assistance to GSA and other executive agency contracting officers in the development and use of transportation terms and conditions for inclusion in invitations to bid and contracts for supplies and equipment, and *in the furnishing of transportation cost data for use in the evaluation of bids; and for the negotiation with carriers and carrier committees for fair and reasonable transportation rates*, storage-in-transit agreements, and rules and regulations pertaining to volume movements of executive agencies.

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is intended that this paragraph should be construed liberally." H. Rept. No. 670, 81st Cong., 1st Sess., p. 22.

The statute applies to all procurement of property or services by GSA, for its own use or otherwise, and to procurement by other executive agencies which have received delegated authority from GSA (not including agencies subject to armed forces procurement regulations). 41 U.S.C. 252(a).

More specifically, GSA carries out the government's statutory responsibility of transporting, or paying for the transportation of, the household goods of civilian personnel of nondefense agencies who are permanently transferred from one duty station to another (5 U.S.C. 73b–1(a)), App. B, pp. 71–72). The basic implementing regulations under this statute have been promulgated by the Bureau of the Budget (R. 67–73)[20] and provide for two alternative means of carrying out this statutory obligation: (1) the "commuted rate system" by which government employees make their own arrangements for transporting household goods and personal effects, and are reimbursed by the United States pursuant to a schedule of prescribed rates; (2) use of government bills of lading, under which the United States "assumes responsibility for dealings with carriers, including negotiating rates, selecting carriers, and auditing and paying transportation vouchers" (R. 71).

Since it is the latter method of carrying out the statutory duties of GSA which alone is pertinent to the present case, only the regulations dealing with the use of government bills of lading must be evalu-

[20] The pertinent regulations are in Bureau of the Budget Transmittal Memorandum No. 4, February 20, 1960 (R. 67–73), which amended Bureau of the Budget Circular No. A–37, December 30, 1957, App. B, p. 75. The President's authority under 5 U.S.C. 73b–1 to promulgate implementing regulations was delegated to the Bureau of the Budget (Executive Order 10530, 3 CFR 189–190 (1954–1958), App. B, p. 75). Like the underlying statute, the Budget Bureau regulations apply to all civilian employees of the government, including those of the defense agencies, procurement for which is handled by the defense agencies (see note 22, p. 42).

ated in terms of a policy of the use of competitive bidding or negotiation to realize cost savings where prevailing rates are unreasonable or fail to reflect volume savings.

The regulations provide that, because of the additional expense, government bills of lading are to be used for shipping household goods and personal effects "only when actual transportation charges will be substantially below the amounts which the Government would be required to pay under the commuted rate system" (R. 71). They include criteria by which to determine when there is such a substantial advantage and, significantly, make solicitation of lower rates mandatory in certain circumstances. Thus, if a group of employees with household goods aggregating 50,000 pounds or more is to be moved between the same two points within one year, "an effort *shall* be made to obtain favorable transportation rates under the GBL [government bill of lading] method." (R. 71; emphasis added.) In addition, an agency "may in its discretion seek favorable rates" for movements of this volume during a period of more than one year "if it believes there is reasonable opportunity for substantial savings" (R. 71). If a saving of ten percent will result from shipment under a government bill of lading, that method "shall be used" (R. 71–72).[21]

The Budget Bureau regulation also describes certain procedures by which GSA shall assist civilian

[21] In the case of the shipments which gave rise to the present litigation, the cost savings would have amounted to about 66⅔%. *Supra*, p. 6.

agencies in seeking "favorable transportation rates" (R. 72).[22] These have been implemented by GSA in regulation TPS 7460.1 (R. 51–66)[23] which sets forth detailed procedures to be followed by TPUS in "handling mass movements of household goods and personal effects of employees of civilian agencies, upon transfer of official station within the continental United States" (R. 51). The stated objective of this regulation is "to evaluate mass movements of household goods and personal effects and, when feasible, to negotiate with carriers to effect the most economical basis for the movement of such household goods and personal effects" (*ibid.*).

TPUS is directed to evaluate for civilian agencies proposed mass movements (as defined by the Budget Bureau criteria) of household goods and personal effects between two official stations and to determine whether "savings to the Government * * * may result from arranging with carriers for rates for a mass movement" (R. 56). If so, TPUS "shall request eligible carriers to submit rate offers or bids" (*ibid.*), by formal advertising or negotiation. Under either method, "[c]arriers shall be requested to furnish rate offers or bids on the basis of a single rate per 100 pounds to cover *all* of the services which the carrier would be required to perform under the specifications to provide the owner of the property with a complete

[22] The Budget Bureau regulation directs the Department of Defense to carry out the same responsibilities for its civilian employees (R. 67–68, 73), which has been done through the military procurement regulations described *supra*, pp. 34–37.

[23] TPS 7460.1 is set out in the record, and here cited, as promulgated on March 15, 1960.

moving service" (R. 57; emphasis in original; see Specifications, R. 62-63). The resulting estimated cost is furnished by TPUS to the interested civilian agency and, if the latter determines that a mass movement on government bill of lading "will be advantageous to the Government," a contract for such mass movement "must be entered into between the carrier and the United States Government" (R. 58).

It is thus clear that the federal statutory and regulatory procedures for the transportation of household goods belonging to personnel of nondefense agencies, like military procurement—"sanction the policy of negotiating rates for shipment of federal property and entrust the procurement officers with discretion to determine when existing rates will be accepted and when negotiation for lower rates will be undertaken."[24] In fact the GSA regulations go well beyond sanctioning negotiation for rates lower than those generally applicable and *direct* that, in certain situations, procurement officials *shall* solicit lower rates reflecting the volume of government shipping (R. 71; see also R. 56).

B. THE CONFLICT OF GEORGIA'S RATE REGULATION WITH FEDERAL POLICY RELATING TO THE PROCUREMENT OF TRANSPORTATION SERVICES

The Georgia Motor Vehicle Code provides that the Georgia Public Service Commission "shall prescribe just and reasonable rates, fares, and charges for transportation by motor common carriers of passengers,

[24] *Public Utilities Commission of California* v. *United States*, 355 U.S. at 543.

baggage and property" (Ga. Code Ann. 68–613, App. A, p. 69), and it prohibits both carriers and shippers from deviating or seeking a deviation from the prescribed rates (Ga. Code Ann. 68–614, App. A, p. 69). The Georgia tariff also explicitly prohibits the very "mass movements" of household goods at a reduced volume rate which are prescribed by the Budget Bureau regulations and the implementing directives of GSA and the Defense Department, for it provides that "[p]roperty of two or more families or establishments will not be accepted for transportation as a single shipment."[25] And as the record in this case shows (R. 13, 17–18), the Georgia Commission asserts that a carrier may lose its certificate by deviating from the state tariff in bidding for a United States government contract whether or not any goods are carried pursuant to the bid.

The conflict between this system of state rate regulation and the federal procurement scheme is clear beyond dispute. The federal scheme entrusts "procurement officers with the discretion to determine when existing rates will be accepted" (355 U.S. at 543); it requires solicitation of lower rates when, in the opinion of the appropriate procurement officer, the applicable transportation rate is unreasonable; and it provides in careful detail for using public bidding and negotiation to obtain favored treatment in situations where these methods are justified by the volume of the government's shipment. The Georgia statute seeks to prevent federal procurement officers,

[25] Georgia Household Goods Tariff No. 1-B, MF No. 3, Section I, Rule 15, App. C, *infra*, p. 85.

acting for the United States as shipper, from complying with these duties; it forbids them to solicit a departure from a rate required by Georgia law. And quite apart from this prohibition of solicitation of lower rates, negotiation and public bidding become meaningless if any local carrier that even bids a rate below the established tariff is to be deprived of his license by the State Commission. It is no less plain that applying to government shipments the Georgia prohibition of mass shipments of the property of more than one family would wholly defeat the federal regulations requiring bidding and negotiation to insure that the government enjoys the benefits of volume purchases of transportation.

In sum, the Georgia statute and tariff appear to be designed for the specific purpose of preventing the federal procurement agencies from obtaining the very benefits the federal statutes and regulations are designed to achieve. But if the purpose is not so specific, certainly the policy of Georgia's regulatory scheme is designed to deprive all large shippers of the benefits of competition, whereas the federal procurement statutes, as the Senate Report on the Procurement Act of 1947 indicates,[28] were intended to secure "the benefits of competition" and to protect the United States against "refusal to classify the Government as other than a retail buyer regardless of the quantity purchased." The conflict of policies is complete, and pervasive in its effects.

The present case thus presents the same ultimate question that was resolved in *Public Utilities Com-*

[28] S. Rep. No. 571, 80th Cong., 1st Sess., p. 4.

mission of California v. *United States*, 355 U.S. 534, 542–543, and in an almost identical legal context:

> It seems clear that these regulations * * * sanction the policy of negotiating rates for shipment of federal property and entrust the procurement officers with the discretion to determine when existing rates will be accepted and when negotiation for lower rates will be undertaken. It also seems clear that under § 530 of the California Public Utilities Code this discretion of the federal officers may be exercised and reduced rates used only if the Commission approves. The question is whether California may impose this restraint or control on federal transportation procurement.

We submit that here, as in that case, the conflict between federal and state law is "as clear as any that the Supremacy Clause, Art. VI, cl. 2, of the Constitution was designed to resolve." *Public Utilities Commission of California* v. *United States*, 355 U.S. at 544. Indeed, in a sense the conflict here is even more pronounced than the "conflict between the federal policy of negotiated rates and the state policy of regulation of negotiated rates" which was so "clear" in the *California Commission* case. For in the latter case, the California agency was authorized to permit the United States to obtain reduced rates. Georgia law makes no such allowance.[27]

[27] See also *Leslie Miller, Inc.* v. *Arkansas*, 352 U.S. 187, striking down the application of state licensing requirements to contractors for the United States as conflicting with federal statutes and regulations authorizing awards to the lowest responsible bidder and establishing criteria for the selection of

In sustaining Georgia's rate regulation the district court relied upon this Court's earlier decision in *Penn Dairies, Inc.* v. *Milk Control Commission*, 318 U.S. 261, and an asserted distinction between the transportation of household goods of government personnel in this case or the purchase of milk in *Penn Dairies*, and the "unique and difficult problems" of the military traffic involved in *Public Utilities Commission of California* (R. 100). While this distinction may be pertinent to the question whether the State has unconstitutionally burdened the exercise by the United States of constitutional powers, discussed *infra*, pp. 51–68, it is irrelevent to decision of the present issue—whether the State regulation conflicts with valid federal law. There is no doubt that the United States may regulate the procurement of its contracts and that it has done so with respect to transportation of household goods. Once this is shown, and it is established that a conflict exists between federal and State regulation of the same subject matter, "the policy of the State must yield." *Franklin National Bank* v. *New York*, 347 U.S. 373, 374; *Mayo* v. *United States*, 319 U.S. 441, 445.

The district court's reliance on the *Penn Dairies* case was misplaced. The fundamental distinction between *Penn Dairies* and this Court's later decision in *Public Utilities Commission of California* v. *United States*, *supra*, is their differing resolutions of the issue

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contractors: *Franklin National Bank* v. *New York*, 347 U.S. 373, invalidating a State statute forbidding national banks to use the word "saving(s)" in their business or advertising as conflicting with federal laws authorizing national banks to receive savings deposits.

of the conflict between federal statutory policy and State law. In *Penn Dairies*, the Court analyzed the early procurement statutes and regulations there applicable, and found no conflict with Pennsylvania's laws fixing the price of milk sold to the government (318 U.S. at 271–278). In contrast, the explicit ground of decision in *Public Utilities Commission of California* was that, upon examination of the Armed Services Procurement Act of 1947 and the regulations applicable to procurement of transportation services which had been issued thereunder, there was a square "conflict between the federal policy of negotiated rates and the state policy of regulation of negotiated rates" (355 U.S. at 544).

Between the dates of the two decisions Congress had passed what the House of Representatives report called "a comprehensive revision and restatement of the laws governing the procurement of supplies and services." H. Rep. No. 109, 80th Cong., 1st Sess., p. 6. See also S. Rep. No. 571, 80th Cong., 1st Sess., p. 2. The regulations issued under the Procurement Act of 1947 greatly elaborated the federal policy of free contracting, effectuated through bidding and negotiation, to assure the United States of obtaining the goods or services it needed at the lowest overall price—at a price that reflected the volume of purchases by the United States rather than arbitrarily classifying the federal government as "a retail buyer regardless of the quantity purchased." S. Rep. No. 571, 80th Cong., 1st Sess., p. 4. As is shown by a comparison of the regulations set out in *Penn Dairies*, 318 U.S. at 275–278, with the regulations in *Public*

Utilities Commission of California, 355 U.S. at 542-543, the determinations of federal policy in the two cases involved consideration of two quite different regulatory schemes and could, entirely consistently, result in differing conclusions. It is this difference, and not a difference in the articles purchased by the United States, which provides the basic distinction between the two cases on the issue of federal regulatory preclusion of conflicting State laws.

Except for the court below in this case, the lower courts have uniformly understood that this Court's holding in *California Commission* as to the import of federal procurement policy, and its supremacy over State regulation, did not depend upon the nature of the commodities involved. Thus, on the precise issue in this case, the Supreme Court of Florida held, in *United States* v. *Carter*, 121 So. 2d 433, that Florida statutes "which expressly prohibit any discrimination in rates and charges made by common carriers" (p. 435) would be unconstitutional if utilized to fix the rates at which the federal government could move household goods of government personnel. The court expressly rejected the argument that *California Commission* was distinguishable because it involved military supplies, stating (121 So. 2d at 437):

> In both instances the property is being moved by the federal government in the fulfillment of its required responsibility to provide for the national defense. * * * Congress, by statutory enactment, has made provision for the transportation of [servicemen's] household goods at government expense. The regulations promulgated pursuant to this statutory authorization

> have stipulated the procedures for carrying out this policy. These regulations have the force and effect of law. * * * In moving both types of property the federal government is acting in the interest of all the people of the country. * * * It is our conclusion that the respondent Commission's application of the Florida Statutes is precluded by the supremacy clause of the Article VI and that the acts of Congress enacted pursuant thereto supersede the state statutes when related to the instant transactions.

In other lower court cases the *California Commission* decision has been applied to invalidate State regulation of government procurement of transportation services for the United States generally (*Railroad Commission of Texas* v. *United States*, 159 Tex. 197, 202, 317 S.W. 2d 927, 930), of electricity (*Arkansas Power & Light Co.* v. *Arkansas Public Service Commission*, 231 Ark. 142, 147–148, 330 S.W. 2d 51, 54) and of milk (*United States* v. *Warne*, 190 F. Supp. 645, 654–657 (N.D. Cal.), pending on appeal, *sub nom. Paul* v. *United States*, No. 19, this Term), as well as of military supplies. *Alabama Hwy. Express, Inc.* v. *United States*, 175 F. Supp. 143, 146 (Ct. Cl.); *Bouton Rapid Express, Inc.* v. *United States*, 171 F. Supp. 868, 872 (Ct. Cl.); *Union Transfer Co.* v. *United States*, 168 F. Supp. 217, 218 (Ct. Cl.); *Hughes Transportation, Inc.* v. *United States*, 168 F. Supp. 219, 220 (Ct. Cl.); *United States* v. *Pennsylvania Public Utilities Commission*, 393 Pa. 537, 541, 143 A. 2d 341, certiorari denied, 358 U.S. 884.

TO APPLY THE GEORGIA RATE REGULATION TO THE TRANSPORTATION CONTRACTS OF THE UNITED STATES WOULD DIRECTLY, AND THEREFORE UNCONSTITUTIONALLY, REGULATE AND BURDEN THE OPERATIONS OF THE FEDERAL GOVERNMENT

The complaint alleged that, quite apart from the federal statutes and regulations, the Georgia rate regulation is unconstitutional because it violates the United States' inherent constitutional immunity from State regulation (R. 5). In analyzing this claim, which we earnestly renew, it is essential to observe the exact limits of the constitutional question. The United States indubitably has some degree of sovereign immunity from both State taxation and State regulation as an "unavoidable consequence of that supremacy which the constitution has declared." *McCulloch* v. *Maryland*, 4 Wheat. 316, 436. Congress may define its operative limits, either by waiving any part of the immunity that would otherwise exist (see *Mayo* v. *United States*, 319 U.S. 441, 448), or by ousting State-imposed burdens that unduly hamper the effectuation of federal policies (*Federal Land Bank* v. *Kiowa County*, 368 U.S. 146, 149 and cases cited). When neither Congress nor its authorized delegates in the executive branch have spoken, as we now assume to be the case, it is for the Court to determine what rule shall prevail until Congress expresses a policy. The task is not unlike that of determining how far a State may regulate or tax interstate commerce in the silence of Congress.

Two rules for dealing with this situation have come to be settled:

First, a State may not directly regulate or tax the property, instrumentalities or activities of the United States. *Johnson* v. *Maryland*, 254 U.S. 51; *Arizona* v. *California*, 283 U.S. 423; *Van Brocklin* v. *Tennessee*, 117 U.S. 151; *Mayo* v. *United States*, 319 U.S. 441; see *Penn Dairies, Inc.* v. *Milk Control Commission*, 318 U.S. 261, 269; *United States* v. *City of Detroit*, 355 U.S. 466, 469.

Second, the fact that nondiscriminatory State taxation or regulation of one doing business with the federal government imposes an increased economic burden upon the United States is not alone enough to give the contractor immunity from the taxation or regulation. *James* v. *Dravo Contracting Co.*, 302 U.S. 134; *Alabama* v. *King & Boozer*, 314 U.S. 1; *United States* v. *City of Detroit*, 355 U.S. 466; *James Stewart & Co.* v. *Sadrakula*, 309 U.S. 94; *Penn Dairies, Inc.* v. *Milk Control Commission*, 318 U.S. 261.

While the boundary dividing the spheres of application of each of these rules may not be clear in every case, one subsidiary proposition is both easily applied and firmly established. A State may neither address a command to nor impose a tax upon the agents and officers of the United States when they are acting in the course of their Constitutional powers. This proposition in itself determines the present case, for the Georgia statutes are, on their face, a direct regulation addressed to the federal government as a shipper. The rates are fixed by the Public Service Commission and to receive "a greater or less or

different compensation for the transportation" is a violation of Georgia Code Chapter 68–6. See Ga. Code Ann. 68–614. All shippers, including federal officers and employees, are prohibited from seeking a different rate by Section 9911 of the same chapter which provides—

> Every officer, agent, or employee of any corporation and every person who violates or fails to comply with the provisions of Chapter 68–6 relating to the regulation of motor common carriers, or any order, rule, or regulation of the Public Service Commission, or who procures, aids, or abets therein, shall be guilty of a misdemeanor.

Misdemeanors are punishable by fine or imprisonment. Ga. Code Ann. 27–2506. Thus, here as in *Public Utilities Commission of California* v. *United States*, 355 U.S. 534, 538, "If a United States officer were to negotiate with a carrier for 'reduced rates' * * * he could be thrown into the county jail." This circumstance distinguishes *Penn Dairies, Inc.* v. *Milk Control Commission*, 318 U.S. 261, 277 where, as the case came before the Court, the State regulation imposed no prohibition on the federal government or its officers; they, Mr. Chief Justice Stone said, "may purchase milk from whom and at what price they will, without incurring any penalty" (318 U.S. at 270).[27a]

[27a] The district court below was mistaken in its belief (R. 97) that the Pennsylvania law involved in *Penn Dairies* imposed criminal penalties upon all purchasers as well as sellers of milk at other than the prescribed prices. Pennsylvania's Milk Control Act, as enacted in 1937, made it a crime "for a milk dealer or producer"—not for others—to buy or sell milk, or offer to do so, at other than the prescribed prices (Section 807, Pa. Laws 1937, Vol. I, pp. 446–447). This was the state statute at issue in *Penn*

We do not stand upon that ground alone. Defining the boundary line between direct regulation or taxation of the United States and taxation or regulation of one doing business with the United States involves recognition of the fact that a State may attempt to tax or regulate the activities of the federal government without verbally addressing its commands to a class including the United States or its agents. It is the activities of the United States and not merely its agents that must be free from State interference. Included among those activities is the federal government's exercise of its powers to contract. Accordingly, we submit that a State may not regulate the terms of a transaction by which the United States obtains services or supplies.[28]

This proposition may be fitted into the basic principles stated above in either of two ways. One formulation would recognize that in determining whether an attempted State regulation of the terms of a con-

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Dairies, and it clearly did not threaten federal procurement officials (see brief for the appellants in No. 399, O.T. 1942, pp. 12, 48).

The district court erroneously cited Section 807 in its present form (31 Pa. Stat. Ann. [Purdon's] Sec. 700 j–807), which imposes criminal sanctions upon "any person" who buys or receives milk, or offers to do so, at other than prescribed prices. The law was amended to this form in July, 1941, during the course of the *Penn Dairies* litigation, but the amended Form was not directly involved in that case. See brief for the appellants in No. 399, O.T. 1942, pp. 12–13.

[28] In *United States and Olin Mathieson Chemical Corp.* v. *Department of Revenue of the State of Illinois*, No. 235, this Term, Jurisdictional Statement filed July, 1962, challenging the constitutionality of an Illinois tax upon sales made to the United States, we deal with the parallel tax aspects of this question.

tract is a "direct" regulation of the United States, it is immaterial whether the regulation of the terms of a contract involves the addressing of a command to some class of which federal officials are members or takes the form of a prohibition on the activities of all sellers of goods or services. In determining what is "direct," in defining the immunity, this Court "goes beyond the bare face of the taxing statute or consider all relevant circumstances." *United States* v. *City of Detroit*, 355 U.S. 466, 469. And to regulate the terms of transactions into which any contractor may enter is, inevitably and directly, to regulate the government itself.

Alternatively, one might reserve the first principle—banning direct taxation and regulation of the United States, its property and activities—for cases in which the legislation is addressed *in haec verba* to the United States or a class of which it is a member. In that event, that principle and the rule denying immunity merely because of an indirect economic burden do not form a dichotomy dividing the universe, but leave room for a third class of cases in which the State statute, although not formally addressed to the United States or its agents, nevertheless imposes more than the kind of indirect economic burden with which the latter rule is concerned. The present case would then fall within the intermediate area, to be governed by a separate rule exempting the contracts of the United States from *direct* regulation without regard to the form of words.

In either event, the immunity is supported both by the prior decisions of this Court and by the

reasons underlying the prohibition against State regulation or taxation addressed to the federal government itself. Under one approach these are reasons for bringing the case within the phrase "direct regulation of the United States," for the rules should cover the cases within its reasons. Under the other approach, they support the recognition of an immunity from direct regulation of the terms of government contracts in addition to the immunity from direct regulatory or tax laws addressed to the United States.

A. THE PRECEDENTS

In *Railroad Co.* v. *Peniston*, 18 Wall. 5, 41–42, Mr. Justice Bradley drew the governing distinction and plainly stated the rule that government contracts are not subject to taxation or regulation by a State:

> The case differs *toto cœlo* from that wherein the government enters into a contract with an individual or corporation to perform services necessary for carrying on the functions of government—as for carrying the mails, or troops, or supplies, or for building ships or works for government use. In those cases the government has no further concern with the contractor than in his contract and its execution. It has no concern with his property or his faculties independent of that. How much he may be taxed by, or what duties he may be obliged to perform towards, his State is of no consequence to the government, so long as his contract and its execution are not interfered with. In that case the contract is the means employed for carrying into execution the powers of the government, and *the contract* alone, and not the contractor, *is exempt from*

taxation or other interference by the State government. (Emphasis supplied.)

This passage was quoted by the Court with approval in the leading case of *James* v. *Dravo Contracting Co.*, 302 U.S. 134, 155. See also the separate opinion of Mr. Justice Frankfurter in *City of Detroit* v. *Murray Corp.*, 355 U.S. 489, 495, 498.

The doctrine was squarely applied in *Kern-Limerick, Inc.* v. *Scurlock*, 347 U.S. 110, where this Court held that an Arkansas sales tax could not constitutionally be applied to sales to the federal government because the government's sovereign immunity had not been waived. The Arkansas law imposed an excise tax of two percent upon the gross receipts of all sales; the tax was to be paid to the State by the seller who, in turn, was required to collect it from the purchaser. Arkansas attempted to collect the tax upon a sale of tractors to be used in constructing a naval depot for the United States under a cost-plus-fixed-fee contract. Arkansas asserted that the sale was to the contractor and was therefore taxable regardless of the incidence of the ultimate economic burden. Cf. *Alabama* v. *King & Boozer*, 314 U.S. 1. The United States and the contractor replied that the purchaser under the contract was the United States. The Court, agreeing that the United States was the purchaser, pointed out that its decisions "consistently prohibit taxes levied on the property or purchases of the Government itself" (347 U.S. at 123), and held that the application of the tax to the sale to the United States violated its constitutional immunity from State taxation even though the seller was the only formal addressee of the statutory command. The dissenting justices concluded that

the contractor was the real purchaser but did not dispute the basic proposition that sovereign immunity exempts the United States from "taxes levied on the * * * purchases of the Government itself." (347 U.S. at 123.)

There is no ground that would benefit appellees for distinguishing between a State law imposing a tax upon sales which the seller is required to collect from the buyer and a State law fixing the price which the seller is required to collect. If there be a difference, the regulation is the more obnoxious because it restricts the manner in which governmental activities can be conducted. See pp. 60–62 below. And surely no line can be drawn between a sale of goods and a contract for transportation.

B. THE REASONS

The three dominant reasons for the immunity of the United States from direct State regulation or taxation of its officers or property, also support the proposition that a State may not directly regulate the terms of its contracts.

(1) It is inherent in the concept of sovereignty that neither the United States nor a State should assert the right to regulate or tax the activities of the other while confined to its constitutional orbit. The alternative is unseemly and harassing conflict. In the present case Georgia has frankly asserted the power to dictate the price term in contracts of the United States for transportation of household goods. The services which the United States seeks to purchase—Georgia intrastate shipments of household goods—can, by Georgia statute, be purchased only from

carriers who are subject to the provisions of the Georgia tariff. And these carriers are forbidden to accept the property of two or more families of government employees as a single shipment or to accept a rate below the minimum set by the Georgia Public Service Commission. Regulation of the services that may be rendered by any possible seller of the transportation service needed by the federal government *is* regulation of the services it can purchase. Regulation of the rate to be charged by the carrier *is* regulation of the compensation to be paid by the shipper. Indeed, regulation of the terms which private persons may put into contracts with the United States *is* regulation of the terms which the United States may put into contracts with private persons. A contract is an integral relationship between two persons; it makes no difference whether its terms be prescribed from one side or the other.

These truths are expressly recognized in the Georgia statute which makes it a crime for federal officers, as shippers, to seek lower or different rates than those specified in the published tariff (see *supra*, pp. 52–53), but the omission of all express references to shippers would not reduce the unseemly intergovernmental conflict.

(2) A second reason for the immunity of the federal government from direct regulation of the activities of its officers and employees is the danger that, wholly aside from any increased economic burden, the application of such State laws would obstruct the United States in the attainment of constitutional purposes. The Court has stated in the broadest terms

that the federal government's dealings with independent contractors are immune from State laws which "interfere in any substantial way with the performance of federal functions" (*James* v. *Dravo Contracting Co.*, 302 U.S. at 157, 161), "handicap efforts to carry out the plans of the United States" (*James Stewart & Co.* v. *Sadrakula*, 309 U.S. 94, 104), or "affect or embarrass in any substantial measure the power of the United States * * * to secure aid from independent contractors" (*Smith* v. *Davis*, 323 U.S. 111, 115). See *Osborn* v. *United States Bank*, 9 Wheat. 738, 867. And this reason for sovereign immunity is also applicable to regulation of the contracts of the United States.

The degree of actual interference will vary from instance to instance. In the present case, it seems clear that more than an increase in cost will be involved if carriers employed by the United States are forced to comply with Georgia law for intrastate transportation of household goods under government contract. As Colonel Higgins, the director of traffic for the Military Traffic Management Agency, stated in an affidavit below, the application of State law would not only increase the expense to the federal government but would also bring "attendant confusion" and "possible delays" (R. 9). Federal agencies would no longer be able to administer a uniform system of procurement applicable to transportation services throughout the country. Instead, they would have one system covering shipments of household goods which cross State lines (or are within those States not seeking to regulate them), and, depending upon State legislatures, up to 50 systems governing

intrastate shipments.[*] Since even single mass transfers can combine interstate and intrastate shipments of household goods, federal officials would have to separate these and comply with separate sets of procedures and rate standards. A State law like Georgia's, which forbids combining the household goods of two or more families as a single shipment would multiply the difficulties in the appraisal of goods and the negotiation and settlement of contracts, as would a State law requiring separate charges for each of the services connected with the shipment of household goods. Compare the General Services Administration regulation set out at pp. 42–43, *supra*. These problems in handling their household goods would often complicate and delay the transfer of government employees to new locations (see R. 36), thus aggravating the interference with federal operations.

In other situations still greater practical interference with the operations of the federal government would follow upon State regulation of the terms of the contracts under which government goods could be carried. The difficulties in the case of military equipment, for example, are graphically described in the case of *Public Utilities Commission of California* v. *United States*, 355 U.S. 534, 544–546, and need not be repeated.

The controlling principle leaves no room for distinctions between different governmental functions,

[*] Colonel Higgins' successor as traffic director of MTMA averred that (R. 37) "if all fifty states were to regulate the rates for the shipment of the household effects of personnel of the Defense Department it would be impossible to carry out or comply with the national procurement statutes and implementing directives."

or for judicial appraisal of the degree of obstruction. Whenever the regulation would directly impinge upon the employees, instrumentalities or activities of the United States, there is immunity in the absence of a Congressional waiver. Whenever the incidence of the statute is upon the contractor's activities incident to performance of the government contract as distinguished from its terms—regulation of the wages he pays his employees or his safety equipment, for example—there is no immunity in the absence of Congressional action no matter how heavy the resulting indirect economic burden may be. This test does not resolve all the difficulties in dealing with intergovernmental immunities, but it achieves sound relationships in most cases and furnishes a workable test.

It is hardly necessary to add that the obstruction of federal activities is the same whether the State attempts to regulate the terms of its contracts in language which speaks of the promises and performance of the government (here the shipper) or of the private contractor (here the carrier). If a State cannot constitutionally forbid the United States from constructing a dam without securing the State's approval of the plans and specifications (*Arizona* v. *California*, 283 U.S. 423, 451–452), it cannot defeat the sovereign exemption by forbidding any contractor to work upon any dam the plans and specifications for which have not been approved.

There are three answers to any suggestion that price and rate regulation must be distinguished from other regulatory State legislation because they place only economic burdens upon the United States. The first answer is that this is not always true, as the

opinion of the Court convincingly demonstrates in *California Commission* v. *United States, supra;* and it is not true in the present case. Second, the thrust of the entire effort to establish workable rules in the field of intergovernmental immunities has been to get away from the appraisal of degrees of burden and to avoid such distinctions as those between a price, a price schedule which affects the kind of service available, and the other terms of performance. Third, the rule that those doing business with the United States cannot claim immunity from non-discriminatory taxation or regulation merely because of a resulting economic burden upon the United States does not mean there is no immunity whenever the only practical impact is economic. Obviously, the practical impact of many non-discriminatory taxes, such as the real property tax, is only economic, yet this Court's decisions "consistently prohibit taxes levied on the property *or purchases of the Government itself.*" *Kern-Limerick, Inc.* v. *Scurlock,* 347 U.S. 110, 123 (emphasis supplied). One aim of the rule is "to keep the contracting governments from putting their hands in each others' pockets." T. R. Powell, *Vagaries and Varieties in Constitutional Interpretation*, p. 128.

(3) This brings us to the third reason for the basic distinction between direct taxation and regulation and mere economic burdens. As the activities and responsibilities of the State and federal governments expanded, it became apparent that the doctrines of intergovernmental immunity exemplified by such decisions as *Gillespie* v. *Oklahoma,* 257 U.S. 501; *New York ex rel. Rogers* v. *Graves,* 299 U.S. 401, and *Panhandle Oil Co.* v. *Mississippi,* 277 U.S. 218, were not

only closing off important sources of revenue but were creating an ever-growing and likely-to-become-odious class of persons who were not required to pay a normal share of the cost of public services because they had some connection with the government. The subsequent decisions holding that "the Government's constitutional immunity does not shield private parties with whom it does business from state taxes imposed on them merely because part or all of the financial burden of the tax eventually falls on the Government" (*United States* v. *City of Detroit*, 355 U.S. 466, 469) and cutting the implied immunity back to exemption from taxes on the government itself, or its property, instrumentalities or purchases (*e.g. James* v. *Dravo Contracting Co.*, 302 U.S. 134; *Graves* v. *New York ex rel. O'Keefe*, 306 U.S. 466; *Alabama* v. *King & Boozer*, 314 U.S. 1), seem to us to reflect a desire to avoid those evils rather than utter indifference to whether the State and federal governments put their hands into each other's pockets.

When the tax or regulation is levied upon the contractor as distinguished from the United States, its property or its contracts, the incidence of the resulting economic burden is problematical. No one could be sure whether the real beneficiary of the older immunity was the government or the employee or contractor. And while there are some cases in which one can be sure that a tax on the contractor will be borne by the United States, dollar for dollar (*e.g. Alabama* v. *King & Boozer*, 314 U.S. 1),[*] in the generality of

[*] In such cases it is significant that the burden has been voluntarily assumed by the United States in its contract, not imposed upon the federal government by the State.

cases the distribution of the burden is indeterminable; all or part might be absorbed or spread out over other undertakings. In contrast, where the tax is upon the United States, its property or contracts and must be paid by the federal government, recognition of the immunity gives no special privilege to private citizens and the government pays the tax, dollar for dollar. The State which attempts to collect such a tax is attempting to raise revenue from the federal government.

Direct price regulation has the same consequence. Georgia's price regulation fixes the exact sum which must come out of the federal treasury, just like a tax upon federal property (*Van Brocklin* v. *Tennessee*, 117 U.S. 151) or upon the privilege of making the shipments (see *James* v. *Dravo Contracting Co.*, 302 U.S. 134, 155). The very aim would seem to be the same as a direct tax—to dip into the federal pocket to increase the return to Georgia's carriers and thereby to acquire the benefits of any improved transportation facilities made available by the increase in income.[31] Free competition, it is thought, may drive prices down to the place where an inadequate return on capital investment is being realized. But once Georgia has regulated the rate to be charged all private users of the State's carrier system, no reduction in return to any or all carriers can result from the entrance into the market of a new customer—the United States—bringing with it a surge of unregu-

[31] While regulation of *maximum* rates could be intended to ensure an equitable distribution of carrier service among all services, this purpose is plainly irrelevant to a regulation of minimum rates.

lated demand. If the State's carriers are operating at full capacity, then to obtain transportation services the United States must offer any carrier a higher net return than that which the carrier could obtain from dealing with private shippers. If the State's carriers are operating at less than full capacity, the addition of the United States' demand for transportation provides additional revenues from the same equipment, which would not be earned if the United States had not chosen to ship within the State. In short, the extension of Georgia's rate regulation to the United States is an attempt by the State to specify the amount of the special benefits it shall enjoy because of the presence of the United States.

We believe that this third element—the direct levy upon the federal treasury—is not only a significant reason for the federal government's immunity from taxes laid upon the United States, its property or contracts but that it is also applicable to the present case. Even if this analysis be rejected, however, the first and second reasons for the constitutional immunity remain, and Georgia lacks power to apply its system of rate regulation to the contracts of carriage negotiated by the United States.

It will be said that this conclusion is contrary to *Penn Dairies, Inc.* v. *Milk Control Commission*, 318 U.S. 261. Two distinctions are at once apparent. First, as noted above, p. 53, the Court there found that "the state regulation imposes no prohibition on the national government or its officers. They may purchase milk from whom and at what price they will, without incurring any penalty." 318 U.S. at 270. Here, for the national government or an officer to re-

quest a rate differing from the Georgia tariff would be a criminal offense. Second, there, it was not impossible to buy milk for the Pennsylvania encampment in other States, and the Court pointed out that the out-of-State purchases would not be subject to the Pennsylvania law. *Ibid.* It is unnecessary to determine whether Chief Justice Stone was correct under the Pennsylvania statute in differentiating so sharply between regulation of the terms on which the government might buy and the conditions on which contractors might sell. The Court was sharply divided, five to three, and Mr. Justice Murphy, who was in the majority, appears to have been more influenced by the need for a wholesome supply of milk than by any rationale of intergovernmental immunities having general application. In the present case, as we have shown, regulation of the carrier's rates is direct regulation of the government's bills of lading and payments; and therefore the sovereign is constitutionally exempt.

We are not unmindful that the assertion of the implied constitutional exemption may sometimes impair a system of State regulation or have untoward social or economic consequences. For example, after the district court's decision in *Paul* v. *United States*, No. 19, this Term, holding that handlers selling milk to the United States were immune from a California law fixing the prices paid to milk producers as well as those charged the United States, the Executive Branch reviewed the underlying questions of policy and decided not to assert whatever immunity might apply to the producer prices. Such problems ought never to be overlooked, but where the State regula-

tion bears directly upon the United States, its activities or its contracts, it should be left to the policy-making branches of the government to determine whether to waive the sovereign immunity otherwise implied in the Constitution.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted.

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APPENDIX A

Georgia Statutes

Sections 613 and 614 of the Georgia Motor Vehicle Code, Ga. Code Ann. 68–613, 68–614, provide in pertinent part:

> 68–613. *Commission's powers over rates.*—The Commission shall prescribe just and reasonable rates, fares, and charges for transportation by motor common carriers of passengers, baggage and property, and for all services rendered by motor common carriers in connection therewith, * * *.
>
> 68–614. *No discrimination in rates, service, etc.*—No motor common carrier shall charge, demand, collect or receive a greater or less or different compensation for the transportation of passengers and property or for any service rendered in connection therewith than the rates, fares and charges prescribed or approved by order of the Commission; * * *.

Section 9911 of the Georgia Motor Vehicle Code, Ga. Code Ann. 68–9911, and Section 2506 of the Georgia Criminal Code (as amended, 1957), Ga. Code Ann. 27–2506, provide:

> 68–9911. *Motor common carrier regulations, violation of.*—Every officer, agent, or employee of any corporation and every person who violates or fails to comply with the provisions of Chapter 68–6 relating to the regulation of motor common carriers, or any order, rule, or regulation of the Public Service Commission, or who procures, aids, or abets therein, shall be guilty of a misdemeanor.

27-2506. *Misdemeanors, how punished.*—Except where otherwise provided, every crime declared to be a misdemeanor shall be punished by a fine not to exceed $1,000, confinement in the county or other jail not to exceed six months, to work on the public works * * * not to exceed 12 months, any one or more of these punishments in the discretion of the trial judge.

APPENDIX B

FEDERAL STATUTORY PROVISIONS

1. The Career Compensation Act of 1949, 63 Stat. 813, as amended, 37 U.S.C. 253(c), states:

> (c) Transportation in kind for dependents on change of station; monetary payment in lieu of transportation; baggage and household effects * * *.
>
> In addition to the [travel and transportation] allowances authorized above, under such conditions and limitations * * * as may be prescribed by the Secretaries concerned, members of the uniformed services when ordered to make a change of permanent station shall be entitled to transportation in kind for dependents or to reimbursement therefor * * *, to transportation (including packing, crating, drayage, temporary storage, and unpacking) of baggage and household effects, or reimbursement therefor * * *.

2. The Administrative Expenses Act of 1946, 60 Stat. 806, as amended, 5 U.S.C. 73b-1, provides:

> § 73b-1. Travel expenses of transferred employees; transportation of families; household goods and personal effects * * *.
>
> (a) Under such regulations as the President may prescribe, any civilian officer or employee of the Government who, in the interest of the Government, is transferred from one official station to another, * * * for permanent duty, shall * * * be allowed and paid from Government funds the expenses of travel of himself and the expenses of transportation of his immediate family (or a commutation thereof

in accordance with section 73a of this title) and the expenses of transportation, packing, crating, temporary storage, drayage, and unpacking of his household goods and personal effects * * *.

3. The pertinent Armed Services procurement provisions are 70A Stat. 127–133, 10 U.S.C. 2301–2314. Section 2304 provides:

§ 2304. Purchases and contracts: formal advertising; exceptions.

(a) Purchases of and contracts for property or services covered by this chapter shall be made by formal advertising. However, the head of an agency may negotiate such a purchase or contract, if—

* * * * *

(2) the public exigency will not permit the delay incident to advertising;

* * * * *

(10) the purchase or contract is for property or services for which it is impracticable to obtain competition;

* * * * *

(15) the purchase or contract is for property or services for which he determines that the bid prices received after formal advertising are unreasonable * * * or were not independently reached in open competition, and for which * * * (B) the negotiated price is lower than the lowest rejected bid of any responsible bidder, as determined by the head of the agency; and (C) the negotiated price is the lowest negotiated price offered by any responsible supplier * * *

Section 2305(c) provides:

§ 2305. Formal advertisements for bids: time; opening; award; rejection;

* * * * *

(c) * * * Awards shall be made with reasonable promptness by giving written notice to the responsible bidder whose bid conforms to the invitation and will be the most advantageous to the United States, price and other factors considered. However, all bids may be rejected if the head of the agency determines that rejection is in the public interest.

4. The Federal Property and Administrative Services Act of 1949, 63 Stat. 383, 393-397, as amended, 40 U.S.C. 481, 41 U.S.C. 251-260. Section 252 provides:

252. Purchases and contracts for property—

(a) Applicability of chapter; delegation of authority.

The provisions of this chapter shall be applicable to purchases and contracts for property or services made by—

(1) The General Services Administration for the use of such agency or otherwise * * *

* * * * *

(c) Negotiated purchases and contracts for property; conditions.

All purchases and contracts for property and services shall be made by advertising, as provided in section 253 of this title, except that such purchases and contracts may be negotiated by the agency head without advertising if—

* * * * *

(2) the public exigency will not admit of the delay incident to advertising;

* * * * *

(10) for property or services for which it is impracticable to secure competition;

* * * * *

(14) for property or services as to which the agency head determines that bid prices after advertising therefor are not reasonable * * * or have not been independently arrived at in open competition: *Provided,* That * * * (B) the negotiated price is the lowest negotiated price offered by any responsible supplier * * *.

Section 253(b) provides:

§ 253. Advertising requirements.

Whenever advertising is required—

* * * * *

(b) * * * Award shall be made with reasonable promptness by written notice to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, price and other factors considered: *Provided,* That all bids may be rejected when the agency head determines that it is in the public interest so to do.

Section 481 provides:

§ 481. Procurement, warehousing, and related activities

(a) The [GSA] Administrator shall, in respect of executive agencies, and to the extent that he determines that so doing is advantageous to the Government in terms of economy, efficiency, or service * * *—

(1) prescribe policies and methods of procurement and supply of personal property and nonpersonal services, including related functions such as * * * transportation * * *; and

* * * * *

(4) with respect to transportation * * * for the use of executive agencies, represent such agencies in negotiations with carriers * * * and in proceedings involving carriers * * * before Federal and Senate regulatory bodies * * *.

FEDERAL REGULATIONS

1. Executive Order 10530, 3 CFR 189 190 (1954 1958):

* * * * *

Section 1. The Director of the Bureau of the Budget is hereby designated and empowered to perform the following-described functions without the approval, ratification or other action of the President:

* * * * *

(b) the authority vested in the President by [5 U.S.C. 73(b)-1(a), 73(b)-1(b)] to prescribe regulations (1) with respect to the allowance and payment from Government funds of the expenses of travel of any civilian officer or employee of the Government transferred from one official station to another for permanent duty, the expenses of transportation of his immediate family (or commutation thereof), and the expenses of transportation, packing, crating, temporary storage, drayage, and unpacking of his household goods and personal effects; and (2) with respect to reimbursement to such officer or employee on a commuted basis in lieu of the payment of actual expenses of transportation, [etc.] of his household goods and personal effects * * *.

2. Bureau of the Budget Circular No. A37, December 30, 1957:

Subject: Regulations prescribing revised commuted rates of reimbursement for transportation and temporary storage expenses for household goods and personal effects of civilian officers and employees upon transfer of official station within the continental United States

[Schedules of rates omitted.]

3. Bureau of the Budget Transmittal Memorandum No. 4, February 20, 1960, amending Circular No. A–37:

[Printed at R. 67–73.]

4. Relevant Department of Defense Regulations:

A. Directive No. 4500.27, July 1, 1960:

Subject: Transportation of Household Goods of Military and Civilian Personnel

[Printed at R. 38–47.]

B. The Military Traffic Management Regulation [promulgated by orders of the Secretaries of the Army, Navy, and Air Force], March 1958, as amended to October 10, 1960:

Chapter 101. INTRODUCTION

101001 *Purpose and Scope.* The Secretary of Defense designated the Secretary of the Army as Single Manager for Traffic Management within the United States by Department of Defense Directive No. 5160.14, dated 1 May 1956. * * * In accordance with the authorities and responsibilities contained in that directive, the Military Traffic Management Regulation is promulgated by the Single Manager. The regulation contains policy guidance and procedures which are applicable to the performance of traffic management functions including the direction, control, and supervision of all functions regarding the effective and economical procurement and use of commercial freight and passenger transportation service by the military departments within the continental United States. The regulation also contains policies and procedures to govern the movement of uncrated household goods between the continental United States and other areas in through bill of lading service as specified in chapter 217.

* * * * *

Chapter 102. GENERAL RESPONSIBILITIES AND TRAFFIC MANAGEMENT POLICIES

* * * * * * * *

102003. *Selection of Carriers or Modes of Transportation.*—* * * In the selection of commercial carriers, the means of transportation selected will be that which produces the lowest overall cost consistent with military requirements, the objectives of governing procurement regulations and the transportation policies as expressed by the Congress * * *, contingent upon carrier ability to provide safe, adequate and efficient transportation.

* * * * * * *

Chapter 201. FREIGHT TRAFFIC NEGOTIATIONS

201001 *Responsibilities of the Executive Director.*—The Executive Director, Military Traffic Management Agency is responsible within the Department of Defense for—

a. Determination of proper freight classification, rates, charges, rules and regulations on military traffic.

b. Negotiation with all for-hire carriers of cargo or their rate-making agencies for classifications, rates, charges, rules and regulations on military traffic * * *.

* * * * * * *

h. Reviewing and maintaining surveillance over new and reissued freight tariffs and tariff supplements to determine changes made thereby which would affect the routing or cost of moving military traffic.

i. Reviewing of all for-hire commercial carrier dockets or other proposals to determine the extent to which military traffic would be affected thereby, and taking action required.

j. Recommending litigation in the transportation and traffic management areas when nec-

essary to protect or promote the interests of the Department of Defense.

k. Receipt on behalf of the military departments of all negotiated and voluntary or unsolicited rate tenders relative to—

* * * * *

(5) Rates.

(6) Adjustment of tariff provisions.

(7) Special arrangements pertaining to other freight traffic * * *.

* * * * *

201005 *Freight Rate Negotiations. a. Opportunities for Rate Negotiations.*—Local transportation officers will be constantly alert to identify opportunities for rate negotiations as far in advance of movement as possible. They will forward this information * * * whenever—

(1) A planned volume movement is scheduled to move from one point of origin to one point of destination, for which the transportation charges will be paid by the Government. * * *

(2) A specific movement not of sufficient volume to report under (1) above that because of peculiar characteristics and/or circumstances presents a need for investigation of present transportation costs and possibility of an adjustment thereof.

b. Information To Be Furnished to MTMA.—The following information will be furnished in accordance with *a* above:

* * * * *

(6) Estimated total weight of shipment.

* * * * *

201006. *Classification Ratings. a. Need for Classification Revision of Negotiation.* Local transportation officers will forward the information indicated in *b* below under proper se-

curity classification to the Executive Director, MTMA, * * * whenever—

* * * * *

(2) It is believed that a rating is unreasonable; * * *

* * * * *

Chapter 202. ROUTING OF SHIPMENTS

* * * * *

202002 *Routing of Freight Traffic.* * * *

b. Specific Considerations. In choosing the carrier(s) for a specific shipment when two or more modes of transportation or individual carriers within a mode of transportation are in position to compete, the principal factors for consideration, in their relative order of importance, are satisfactory service, aggregate delivered cost, and equitable distribution of traffic. Except as otherwise provided for uncrated household goods in chapter 217, these factors will be given consideration as follows:

(1) *Satisfactory service.* * *

(2) *Delivered cost.* When more than one mode, or more than one carrier within a mode, can provide the required service, the mode or carrier(s) that will provide the lowest aggregate delivered cost will be selected. In addition to the actual transportation rates and charges, other known or readily available cost factors should be considered such as the costs for handling, loading, and unloading.

(3) *Distribution.* * * *

* * * * *

Chapter 214. BILLS OF LADING

* * * * *

214009 *When Government Bills of Lading Are Required.*—Government bills of lading are required for all shipments moving via commercial carriers between points in the continental United States for which the Government is responsible for payment of transportation

charges direct to carriers concerned, except when departmental regulations provide otherwise.

* * * * *

Chapter 217. HOUSEHOLD GOODS

217001 *Purpose and Scope.* The Secretary of Defense establishes Department of Defense policy for the transportation of household goods. This chapter implements that policy and establishes traffic management procedures governing the transportation of uncrated household goods of military and civilian personnel of the Department of Defense between points within the United States and between the United States and other areas in through bill of lading service when the transportation is procured and arranged by an agency of the Department of Defense. This chapter does not apply to the movement of—

a. Packed or crated household goods * * *.

b. Household goods of civilian personnel when personally arranged for under the commuted allowance plan.

* * * * *

217002 *Definitions.* As used in this chapter, the following definitions apply:

* * * * *

d. Lowest Overall Cost. The aggregate of all costs which are known or can reasonably be estimated in connection with a shipment: transportation rate(s), accessorial, drayage, storage-in-transit, packing and crating, unpacking * * *.

* * * * *

217004 *Responsibilities of the Executive Director, Military Traffic Management Agency.* The Executive Director, MTMA, is responsible for—

a. Traffic management in the transportation of household goods.

b. Implementing Department of Defense policy in the traffic management of household goods.

* * * * *

c. Accepting tenders of service from commercial carriers of household goods, reviewing such tenders and approving or disapproving carriers for use by military installations. * * *

* * * * *

f. Negotiating special tenders, agreements, or arrangements with commercial carriers for the movement of household goods.

* * * * *

k. Monitoring household goods carriers' compliance with the procedures set forth in joint military publications.

* * * * *

217010 *Tender of Rates and Charges. a.* Special tenders of rates or charges, either of individual carriers or tariff publishing agents, must be submitted in writing to the origin transportation officer. These tenders may be canceled or modified by the carrier upon written notice of not less than 30 days to the transportation officer, except—

* * * * *

(3) Cancellation or modification as may be accomplished upon shorter notice by mutual agreement of the parties concerned.

* * * * *

217012 *Distribution of Traffic and Selection of Carrier. a. Area Served, Availability of Equipment and Facilities.* * * *

b. Selection of Carriers. Only those carriers shall be used which provide high quality service at the lowest overall cost to the Government.

c. Distribution of Traffic.

* * * * *

C. The Joint Travel Regulations, Chapter 8, April 1, 1959, as amended to October 1, 1961:

TRANSPORTATION OF HOUSEHOLD GOODS

* * * * *

8001 DETERMINATION OF MODE OF SHIPMENT

Transportation of household goods is authorized by the mode of transportation * * * which results in the lowest over-all cost to the Government and which provides the required service satisfactorily. If the lowest over-all cost mode cannot provide the required service satisfactorily, the next lowest cost mode shall be used. * * *

5. Relevant General Services Administration orders:

A. TPS 7460.1, March 15, 1960:
SUBJECT: Procedures for Handling Mass Movements of Household Goods and Personal Effects

[Printed at R. 51–66.]

B. Adm 5450.3, Change 4, July 31, 1959:

* * * * *

Part 10. TRANSPORTATION AND PUBLIC UTILITIES SERVICE

Section 1. Commissioner

141. *Responsibilities.*

a. The Transportation and Public Utilities Service is responsible for the development of Governmentwide policies and regulations governing the procurement and utilization of transportation, public utilities, and communications services in the executive agencies; for assisting in the improvement of transportation and traffic practices of executive agencies and assurance of conformity with applicable statutes and GSA policies. * * *.

b. This service is responsible for the provision of advice and expert testimony on behalf of executive agencies in proceedings before Federal and State regulatory bodies involving transportation, public utilities [and] communications * * *; for the representation of executive agencies in negotiations of rates and contracts for transportation, public utilities, and communications services, and the administration of these arrangements, and for the design of rates and rate schedules for public utility service; for the provision of technical advice and assistance to GSA and other executive agency contracting officers in the development and use of transportation terms and conditions for inclusion in invitations to bid and contracts for supplies and equipment, and in the furnishing of transportation cost data for use in the evaluation of bids; and for the negotiation with carriers and carrier committees for fair and reasonable transportation rates, storage-in-transit agreements, and rules and regulations pertaining to volume movements of executive agencies.

c. It is also responsible * * * for assistance to the Bureau of the Budget in the development of regulations governing the transportation of Government employees, their personal effects, and household goods. * * *

142. *Authorities.* The Commissioner, TPUS, in carrying out his assigned program responsibilities exercises authority, such as, but not limited to, the following:

a. *Procurement and Contracting.*

* * * * *

(*a*) Negotiates purchases and contracts for property and services without advertising, and makes any determinations and decisions required in connection therewith * * *.

(b) Makes purchases and contracts for property and services by advertising and deter-

mines that rejection of all bids is in the public interest.

(c) Determines the type of negotiated contract which will promote the best interests of the Government * * *.

* * * * *

Section 2. Office of Assistant Commissioner For Transportation

* * * * *

146. *Transportation Operations Division.*

* * * * *

c. Negotiates for adjustments in rates and charges for specific movements; negotiates necessary contracts, including service agreements, such as storage-in-transit, master weight, average demurrage agreements, and charter parties; maintains current lists of foreign freight forwarders and arranges for their services; negotiates accessorial and other special service arrangements, such as packaging, crating, and freight car leasing.

* * * * *

Section 10. Regional Transportation and Public Utilities Service

* * * * *

189. *Transportation Operations Division.*

* * * * *

b. Negotiates and administers contracts and agreements for special services for which made responsible, such as packing and crating, drayage, * * * and the movement of personal property to new locations for GSA and executive agencies.

APPENDIX C

GEORGIA HOUSEHOLD GOODS TARIFF No. 1-B, MF No. 3

* * * * * *

RULE 8. COMPUTING CHARGES

(a) Except as otherwise provided herein, rates in this tariff are stated in dollars and cents per 100 pounds and total charges shall be computed by multiplying weight of each shipment by the rate shown per one hundred pounds, except as provided in paragraph (b) of this rule.

(b) Transportation charges based on actual weight at the rate provided therefor shall not exceed charges based on the next higher minimum weight at the rate provided for such higher minimum weight.

NOTE: The weights shown under columns headed "Break Point" in Section III are the weights at which a lower charge develops by use of minimum weight and applicable rate shown in the next higher weight bracket.

* * * * * *

RULE 15. BILL OF LADING

All shipments transported under this tariff will be covered by a UNIFORM HOUSEHOLD GOODS BILL OF LADING, the original of which MUST be issued to shipper at time of carrier taking possession of the shipment. The names of only one shipper and one consignee shall appear on one bill of lading, but the bill of lading may also specify the name of a party to notify of the arrival of the shipment at destination. Property of two or more families or establishments will not be accepted for transportation as a single shipment.

NOTE: Reproduction of Uniform Household Goods Bill of Lading appears at end of Section 1.

* * * * *

[A certified copy of the entire tariff, as amended to May 30, 1960, has been lodged by the United States with the Clerk of the Court.]

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. 81.

UNITED STATES OF AMERICA,
Appellant,

vs.

GEORGIA PUBLIC SERVICE COMMISSION,
Appellee.

BRIEF FOR THE GEORGIA PUBLIC SERVICE COMMISSION.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1962.

No. 81.

UNITED STATES OF AMERICA,
Appellant,
vs.
GEORGIA PUBLIC SERVICE COMMISSION,
Appellee.

BRIEF FOR THE GEORGIA PUBLIC SERVICE COMMISSION.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

STATEMENT.

On July 15, 1960, a regional director employed by the General Services Administration was requested by the United States Department of Public Health, Communicable Disease Center of Atlanta, Georgia, to negotiate with carriers for the establishment of economical rates and charges to cover a mass movement of household goods and personal effects of civilian employees of such Communicable Disease Center on transfer from Savannah, Georgia, to Atlanta, Georgia, and vicinity.[1]

[1] Record, p. 12, 2d par.

On July 27, 1960, the regional director invited fifty-four carriers to submit bids for such movement. In response to this invitation thirteen motor carriers submitted timely bids. Eight motor carriers quoted rates as published in a tariff filed with and approved by the Georgia Public Service Commission, and the other five motor carriers, including Consolidated Van & Storage Companies, Inc., submitted bids based on rates lower than those published in such tariff.[2]

Upon evaluating the bids, the regional director determined that Consolidated was the lowest responsive bidder and, consequently, awarded the contract to it on August 5, 1960.[3]

Subsequently, the Georgia Public Service Commission advised Consolidated, and the other four motor carriers who bid lower than the rates published in such tariff, that should they perform at the rates quoted the regional director, they would be in violation of the Commission's rules and subject to having their intrastate operating certificates revoked. By letter dated August 23, 1960, Consolidated advised the regional director that it would be unable to perform the services under the contract awarded August 5, 1960.[4]

Later, the regional director procured the movement of such household goods and personal effects at charges assessed and collected by a motor carrier pursuant to rates published in a tariff filed with and approved by the Georgia Public Service Commission.[5]

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[2] Record, p. 12, last par., p. 13.

[3] Record, p. 13, 2d par.

[4] Record, p. 13, 2d par.

[5] Record, p. 13, 4th par. The Appellant contends that it was "compelled to transport the approximately 43,670-pound shipment at the prescribed rates at an increase in cost of about 66 2/3% over the charges originally quoted by Consolidated" (Appellant's Brief,

The above rates paid by the United States were prescribed by a household goods commodity tariff filed with and approved by the Georgia Public Service Commission.[5] Household goods are a frequent item of transportation and, consequently, it is the general practice of governmental agencies regulating such transportation to adopt or approve commodity rates for household goods. Practically speaking, no household goods move at the higher class rates.

We should note that the household goods and personal effects involved in such movement constitute private property owned and used by civilian employees of the Federal Government and do not constitute property owned or used by the General Government. The movement originated from the private dwellings of such civilian employees at Savannah, Georgia, and terminated at their private dwellings in Atlanta, Georgia, and vicinity. Consequently, the movement did not involve an area under the exclusive jurisdiction of the Federal Government, nor did it involve an area rented, leased or otherwise held by it. Furthermore, such movement was wholly intrastate.

---

p. 6, 2d par.). It is interesting to note that there was available to the regional director the services of a number of carriers having authority to transport household goods between the points involved at Commission-prescribed rates which would have produced even lower overall charges than those quoted by Consolidated. While the Appellant's exhibit at page 26 of the Record showing the charges paid on his movement does not show sufficient detail of the packing actually performed to here permit exact comparison of charges, it is apparent that based on the weights shown, the Appellant paid 65 per cent more in line haul freight charges alone than would have been charged under these lower Commission-prescribed rates. See certified copies of the order of the Georgia Public Service Commission in Docket 6840-A, and a representative list of carriers legally required to apply the rates and charges contained in that order, which documents have been lodged with the Clerk of the Supreme Court in the same manner as the Appellant has lodged a certified copy of Georgia Household Goods Tariff No. 1-B, GPSC-MF No. 3 (Appellant's Brief, p. 86).

[5] Record, p. 26, 9th line

SUMMARY OF ARGUMENT.

Part I of the Argument is devoted to a consideration of the jurisdictional aspect of this appeal as requested by the Court in its Order Postponing Jurisdiction of May 21, 1962.[7]

As to the merits, the Appellant contends, by virtue of the federal statutes and regulations referred to in Appendix B of its Brief, that Sections 68-613, 68-614 and 68-9911 of the Code of Georgia of 1933 are unconstitutional insofar as they confer upon the Georgia Public Service Commission the power to regulate the rates in contracts entered into by the United States with motor carriers for the movement of the household goods and personal effects owned by civilian employees of the United States Department of Public Health, when such movement is in intrastate commerce within the State of Georgia. The Appellant claims that the burden imposed upon it by state regulation is a direct interference with its activities.

The Georgia Public Service Commission contends to the contrary, and claims that the burden imposed upon the United States is indiscriminate and incidental.

The United States in its contention places chief reliance on *Public Utilities Commission of the State of California v. United States*[8] and the Georgia Public Service Commission in its contention places chief reliance on *Penn Dairies Inc., and the United States v. Milk Control Commission of the Commonwealth of Pennsylvania.*[9]

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[7] Record, p. 106.

[8] (1958), 355 U. S. 534, 2 L. ed. 2d 470, 78 S. Ct. 446, reh. den. 356 U. S. 925, 2 L. ed. 760, 78 S. Ct. 713.

[9] (1943), 318 U. S. 261-284, 87 L. ed. 748-761, 63 S. Ct. 617-628.

An exploration of the merits requires initially a search for the congressional intent, as reflected by the federal statutes and their legislative history. If this inquiry does not decide the case, then we must press on to a consideration of whether Georgia's program for the rate regulation of intrastate motor carrier transportation imposes any burden upon the United States which violates its implied immunity. The congressional intent aspect is considered in Part II of the Argument and the implied intergovernmental immunity aspect is considered in Parts III through V. Part VI embraces both aspects.

I.

The Georgia Public Service Commission contends that the Three-Judge District Court below was properly convened and that, consequently, this Court has jurisdiction of this direct appeal.

The jurisdictional aspect of this case turns on whether or not the Appellant's complaint, attacking the application of certain Georgia Code Sections regulating intrastate motor carrier transportation, incorporated a ground of "unconstitutionality" within the meaning of 28 U. S. C., Section 2281, which requires the convening of a three-judge district court, when a substantial ground of "unconstitutionality" is alleged.

The complaint alleged, inter alia, that the Georgia Code Sections directly violated various Clauses in Articles I and IV of the Constitution, exclusive of the Supremacy Clause. If this Court finds these grounds to be substantial, then they would independently constitute grounds of "unconstitutionality" within the meaning of 28 U. S. C., Section 2281, and hence, support the Court's jurisdiction of this direct appeal.[10]

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[10] *Query v. U. S.* (1942), 316 U. S. 486, 86 L. ed. 1616

The complaint further alleged that such Georgia Code Sections conflicted with certain provisions of the Federal Property and Administrative Services Act of 1949 and, hence, violated the Supremacy Clause. The Appellant and Appellee have resolved the preliminary question of the construction of Georgia Code Sections 68-623 and 68-614 by agreeing that the Georgia Commission asserts the right to regulate the rates governing the federally arranged transportation involved in this case. Consequently, "This case presents a sole, immediate constitutional question," as defined by *Kesler v. Department of Public Safety*[11] and, therefore, independently presents a ground of "unconstitutionality" within the meaning of 28 U. S. C., Section 2281, and, hence, supports the Court's jurisdiction of this direct appeal.

II.

The federal statutes relied upon by the Appellant, as applied to the facts in this case, require that the method of arranging rates be accommodated to the existing state regulatory framework.

The regional director in arranging the transportation of civilian owned goods in this case acted under the provisions of Federal Properties and Administrative Services Act of 1949 and supplemental administrative regulations, and the Appellant, in its assault upon the applicability of Georgia's regulation of such transportation, places its chief reliance upon the competitive bidding and negotiation provisions of such Act and regulations.

In *Penn Dairies*, this Court construed legislation and regulations analogous to those relied upon by the Appellant herein, and held in favor of state price regulation.

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[11] (1962), 369 U. S. 153, 158, 1st par., 7 L. ed. 2d 641, 647, 1 col., 1st par.

Furthermore, legislative history and a comparison between the language of the provisions construed in *Penn Dairies* and the provisions involved herein, reveal that the current provisions were derived from the earlier ones. It is a well recognized canon of construction that where statutory provisions which have been construed by this Court have been reenacted in the same, or substantially the same, language, the Congress is presumed to have been familiar with their construction and to have adopted it as a part of the law, unless a contrary intent clearly appears or a different construction is expressly provided for.[12]

Furthermore, other provisions of the Federal Property and Administrative Services Act of 1949 and other statutes of Congress unequivocally demonstrate the congressional intent to subjugate the Federal Government's interest in the lowest cost procurement of supplies and services to the higher interest in stabilizing and stimulating the national economy.

Manifestly, the Congress in enacting these procurement statutes did not intend the obtainment of unregulated rates, but the accommodation of the method of arranging rates to the existing state regulatory framework. Had its purpose been merely to insure low rates, it could easily have declared that competitive bidding and negotiation for government contracts should be unaffected by state regulation.

III.

An analysis of *Penn Dairies* and kindred decisions reveals that the imposition by a state of an indiscriminate and incidental burden upon the United States does not contravene its implied immunity.

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[12] *U. S. v. Dixon* (1954), 347 U. S. 381, 384, 2d par., 98 L. ed. 785, 1. col., 2d par., 74 S. Ct. 966.

Penn Dairies, *Alabama v. King & Boozer*,[13] *Graves v. New York ex rel. O'Keefe*[14] and other decisions clearly reveal that private contractors who merely have business or other relations with the United States are susceptible to state regulation, irrespective of the fact that an indirect, indiscriminate and incidental burden may be transmitted through them to the United States. These decisions also established the doctrine that the immunity of federal instrumentalities from the indirect affect of state regulation and taxation is a matter for the Congress to determine and that the judicial function is limited to the interpretation of the congressional will.

IV.

An analysis of *Public Utilities* and kindred decisions reveals that state action interfering with the exercise of a federal function contravenes the implied immunity of the Federal Government.

In *Public Utilities*, this Court held invalid, under the Supremacy Clause of the Federal Constitution, a California statute prohibiting carriers from transporting property owned by the United States at rates other than those approved by the California Public Utilities Commission on the ground that such statute interfered with the United States in performing its function of providing for the national defense.

In its opinion, this Court made it abundantly clear that it did not intend that *Public Utilities* would eclipse or devitalize the doctrine reflected by *Penn Dairies*. Furthermore, *Public Utilities* plainly did not announce any change in doctrine by this Court because of the three Michigan

[13] (1941), 314 U. S. 1, 86 L. ed. 3, 62 S. Ct. 43

[14] (1939), 306 U. S. 466, 83 L. ed. 977, 59 S. Ct. 595, 120 A. L. R. 1360

Cases[15] decided on the same day as *Public Utilities*, which relaxed the doctrine of intergovernmental immunity even further by limiting the immunity of private concerns engaged in work for the United States.

The rationale of *Public Utilities* is consistent with that expressed in *McCulloch v. Maryland*,[16] *Arizona v. California*,[17] *Johnson v. Maryland*[18] and other decisions. These decisions reflect the federal half of the implied intergovernmental immunity doctrine which absolutely immunizes the United States, together with its functions, property and instrumentalities, from any direct burden imposed by a state. However, these decisions do not in any manner immunize, from state regulation, private contractors who merely have business or other relations with the United States irrespective of the fact that an indirect, indiscriminate and incidental burden may be transmitted through them to the United States.

V

(A) The rate statutes and regulations do not place an unconstitutional burden upon the United States or its officers.

In attempting to fashion an unconstitutional burden, the Appellant first complains that the Georgia tariff provisions requiring that the "Property of two or more families or establishments will not be accepted for trans-

[15] *U. S. v. City of Detroit* (1958), 355 U. S. 466, 2 L. ed. 2d 424, 78 S. Ct. 474; *U. S. v. Township of Muskegon* (1958), 355 U. S. 484, 2 L. ed. 436, 78 S. Ct. 483; and *Detroit v. Murray Corp. of America* (1958), 355 U. S. 489, 2 L. ed. 2d 441, 466, 78 S. Ct. 458, 480.

[16] (1819), 4 Wheaton (U. S.) 316, 4 L. ed. 579.

[17] (1931), 283 U. S. 423, 75 L. ed. 1154, 51 S. Ct. 522.

[18] (1920), 254 U. S. 51, 65 L. ed. 126, 41 S. Ct. 16.

portation as a single shipment,"[19] unduly impedes the United States' ability to procure mass movements of household goods of its employees.[20]

The tariff in no way impedes mass movements, but merely requires that the rate be computed on an intrastate single shipment basis irrespective of the number of intrastate single shipments combined in a mass movement. Under any arrangement for transporting property for hire, there must be an evaluation of the character and weight of the property to be transported in order to compute the rates therefor, whether they be established by state regulation or arrived at by negotiation or competitive bidding. Consequently, the goods of each federal employee in a mass movement must be so evaluated and, thereupon, it is as easy to apply a state tariff as it is to apply a rate obtained otherwise.

Next, the Appellant complains that if it must abide by state rate regulation in intrastate commerce, it "would have one system covering shipments of household goods which cross State lines (or are within those States not seeking to regulate them), and, depending upon State legislatures, up to 50 systems governing intrastate shipments."[21] However, we should note that under the "cut-throat" competitive conditions sought by the Appellant, federal procurement officers would be continually negotiating and renegotiating rates and advertising and re-advertising for competitive bids on rates, which rates would be as infinite and varied as the number of carriers interested in doing business with the United States. In sharp contrast to this instability, is the state regulation of intrastate commerce under which the tasks of the fed-

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[19] Appellant's Brief, App. C, p. 85, last par.

[20] Appellant's Brief, pp. 44, 1st par.; 61, 1st par.

[21] Appellant's Brief, p. 60, last par.

eral procurement officers would be greatly simplified and expedited because only a relatively small number of governmentally-fixed rate systems would have to be applied.

In conclusion of this aspect of the case, it seems clear that the United States in acting in accord with Georgia's program of rate regulation is completely free to procure intrastate transportation in such volumes, for such destinations, and at such times as it desires. Therefore, such rate regulation imposes no prohibition on the United States or its officers.

(B) The criminal statute is inapplicable to federal officers.

In the lower court, the Appellant did not attack the criminal statute specifically or raise its applicability in this case. Consequently, the Georgia Public Service Commission was afforded no fair opportunity to place in evidence an affidavit to the effect that the criminal statute has never been utilized in the prosecution of a shipper or an agent acting in behalf of the shipper and that it has never been interpreted as to being applicable to shippers. The courts of Georgia accord great weight to administrative interpretation of statutes, and strictly construe criminal statutes against the state. Therefore, the attack comes too late at this stage of the litigation, and, even if we assume its timeliness, it would be inapplicable in the prosecution of shippers.[22]

In any event, it seems clear that a state criminal statute would have no applicability to a federal officer in the performance of his official duties. There is a clear distinction between a state, on one hand, imposing an indirect burden on the Federal Government by regulating carriers doing business with it, and, on the other hand, interrupting the

[22] *U. S. v. Farrar* (1930), 281 U. S. 624, 74 L. ed. 1078, 50 S. Ct. 425, 68 A. L. R. 802.

acts of the Federal Government by arresting a federal officer in the performance of his official duties, the latter of course being constitutionally prohibited.[23] Even if a state should attempt to so apply such a statute, there would be time enough to properly dispose of such an attempt.

VI.

Penn Dairies and *Public Utilities* are in harmony and the facts in this case are governed by *Penn Dairies*.

The doctrine evinced by *Penn Dairies*, *King & Boozer*, *Draco*, *O'Keefe* and analogous decisions demonstrate that an indiscriminate and incidental economic or administrative burden placed on the United States as a result of state regulation or taxation is not unconstitutional, provided there is no clear congressional intent shown to immunize against such a burden. The congressional immunization question is foreclosed in this case because the statutes considered herein are analogous to those construed by the Court in *Penn Dairies*. Under such circumstances, the amount of the economic burden is not a determining factor as is illustrated by the tax decisions which resulted in enormous economic burdens being placed on the United States.

When the United States avails itself of an intrastate transportation system regulated by a state, the United States should pay its fair share of the cost necessary to adequately maintain such a system. The theory of state regulation of rates is to fix them at the lowest reasonable level necessary to maintain the economic stability of the industry regulated. The United States is the biggest spender in the Nation. To permit this tremendous economic force to penetrate the rate floors established by state

[23] *Cunningham v. Neagle* (1890), 135 U. S. 1, 34 L. ed. 55, 10 S. Ct. 658.

regulation would stimulate destructive competition in a regulated industry. The effect would be a heavy economic depressant operating on a national scale. Should such a result be readily inferred from congressional legislation? The Court has answered the question in the negative on numerous occasions.

In this case, as in *Penn Dairies*, the price regulation affects the United States only by increasing the price it pays. In *Penn Dairies* the Court recognized that the control of prices in the milk industry is clearly within the police power of the states since the public health is so directly affected. In this case, the regulation of rates in the intrastate transportation industry is also clearly within the police power of the states because the adequacy of the industry and its consequent ability to properly serve the general public is directly affected. The burden placed on the United States is only incidental to the enforcement of state milk and motor carrier regulations and the increased cost in each case is not one which was expressly made to discriminate against the United States, nor is it one which interferes with the performance of a federal function.

In *Public Utilities*, the state had enacted legislation which directly regulated the United States, by name, when it should apply for reduced rates for the transportation of property. The state statute provided that "The (state) commission may permit common carriers to transport property at reduced rates for the United States . . . to such extent and subject to such conditions as it may consider just and reasonable." The legal effect of such a statute is to place the United States under the heel of the state when applying for reduced rates. When a state formally addresses its regulation to the United States the burdens presented are no longer indirect, indiscriminate or incidental in the constitutional sense, irrespective of how

favorable such an address might be in a purely economic sense. This direct interference by a state with the United States was relied on heavily in the decisions of the lower Court and this Court in *Public Utilities*.

By contrast, the Georgia statutes do not name the United States, but operate indiscriminately upon all shippers. The Georgia statutes do not interfere with the procurement of transportation by the United States, but merely impose an indiscriminate and incidental burden on it.

Next, we should note that in *Public Utilities* the property being transported consisted of military weapons and supplies. The District Court and this Court interpreted the state regulation as interfering seriously with the flexibility, speed and security requirements of moving military property. This is a crucial consideration during the current Cold War when espionage is being conducted in this Country by foreign powers. The opportunity for total war or limited conflict is ever present. Never in our history have the needs of immediate national defense been so synonymous with national survival. Obviously, a state cannot interfere with the United States in the performance of its paramount responsibility of providing for the national defense.

By contrast, this case involves the intrastate transportation of the household goods and personal effects of civilian employees of the United States Department of Public Health. The movements here are remote from the considerations of national defense as compared with the military movements in *Public Utilities*. In this case, the national interest is more concerned with the maintenance of an economically sound commercial transportation system and its effect on the national economy and defense, than with the indiscriminate and incidental burden placed on the United States. The District Court dramatically illustrated this distinction when it opined that "There

is a constitutional difference between a milk can and a hydrogen bomb!"[26]

Furthermore, Public Utilities involved the transportation of substantial quantities of exotic military weapons and supplies for which no commodity rates had been devised. Consequently, under the California regulations such military property would have to move under the higher class rate. On the other hand, the vast majority of private property moves at commodity rates because such property involves the common articles of commerce for which commodity rates have been devised. Therefore, the effect of such rate classification by California would impose a substantial economic discrimination against the United States in comparison with private shippers because of the uniqueness of much of the military property transported.

By contrast, this case involves the transportation of household goods and personal effects which are frequent items of commerce throughout the Nation. Georgia, like all the states which regulate the rates for the transportation of property, has devised commodity rates. Consequently, the economic burden imposed upon the United States is the same burden imposed upon private shippers.

The *Penn Dairies* doctrine is essential in preserving the vitality of our dual form of government, just as the *Public Utilities* doctrine is essential in prohibiting state interference with the performance of federal functions. The two doctrines coexist under our Federal Constitution. The over-expansion of either doctrine results in debilitating the desired vitality of the governmental victim.

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[26] *United States v. Public Utilities Commission of the State of California* (D. C.—N. D. Cal.—1956), 141 F. Supp. 168, 180, 1st col., 2d par.

ARGUMENT.

I.

The Three-Judge District Court Was Properly Convened So as to Justify This Direct Appeal to This Court.

This Court by Order of May 21, 1962, postponed the question of jurisdiction until a hearing of the case on the merits and requested counsel "to brief and argue, in addition to the merits, the question of this Court's jurisdiction on direct appeal under 28 U. S. C., § 1253."[27]

Section 1253 provides for direct appeal to this Court from the grant or denial of injunctive relief in any civil action required "to be heard and determined by a district court of three judges." Consequently, this Section leads us to the construction of 28 U. S. C., Section 2281, as to whether this case is one required by it to be heard and determined by a three-judge district court and, hence, whether this Court has jurisdiction of this direct appeal under Section 1253.

Section 2281 provides that injunctive relief against the enforcement of any State statute "shall not be granted by any district court or judge thereof upon the ground of the unconstitutionality of such statute unless the application therefor is heard and determined" by a three-judge district court. Therefore, we must determine if the Appellant's complaint challenged the Georgia Code Sections on grounds of "unconstitutionality" within the meaning of Section 2281.

The complaint attacked the validity of the Georgia Code Sections in the following terms:[28]

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[27] Record, p. 106.

[28] Record, p. 5, par. VI.

The United States avers that insofar as the various sections of the Georgia Statutes cited above empower The Georgia Public Service Commission to prescribe the rates for shipments of property for the United States between points in Georgia, they are unconstitutional and void under Article VI, Section 2 of the Constitution of the United States in that:

1. For no valid reason within the police powers or other reserved powers of the State of Georgia, they place an unreasonable burden and impediment on the United States in the discharge of its constitutional powers and responsibilities under Article I, Section 8, Clauses 7, 12, 13, 16 and 17, and Article IV, Section 3, Clause 2, of the Constitution of the United States.

2. They place an unreasonable burden on interstate commerce in an area under the exclusive jurisdiction of the Congress of the United States pursuant to the provisions of Article I, Section 8, Clause 3, of the Constitution of the United States.

3. They contravene the policy of Congress implicit in the *Federal Property and Administrative Services Act of 1949*, Public Law 1952, 81st Congress, 1st Session, Sections 201 and 202, 63 Stat., at page 377, relating to the negotiation for the transporting of property for the United States and the regulations of the various departments and agencies of the United States issued pursuant thereto.

Obviously, subparagraphs 1 and 2 above allege direct violations of the Federal Constitution which, if substantial, require the convening of a three-judge district court.[29]

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[29] *Query v. U. S.* (1942), 316 U. S. 486, 86 L. ed. 1610; *Stratton v. St. Louis Southwestern Railway Co.* (1930), 282 U. S. 10, 75 L. ed. 135; *Ex Parte Northern Pacific Railway Co.* (1932), 280 U. S. 142, 74 L. ed. 233; *Louisville & Nashville Railroad Co. v. Garrett* (1913), 231 U. S. 298, 58 L. ed. 229.

Subparagraph 3 alleges a conflict between the Georgia Code Sections attacked and the Federal Property and Administrative Services Act of 1949 and supplemental administrative regulations which also requires the convening of a three-judge court as discussed later in this subdivision of the Brief. By virtue of these allegations, the Three-Judge District Court below was convened under Section 2281.[30]

Subsequently, the Appellant, in response to the District Court's order granting the Appellee's Motion for More Definite Statement, eliminated the issue involving the State regulation of rates charged by carriers for the intrastate transportation of property owned by the United States and limited the allegations of the complaint to the following issue:[31]

> Are the pertinent sections of the Georgia statute unconstitutional insofar as they confer upon the Public Service Commission of Georgia the power to regulate the rates in contracts entered into by the United States with carriers in Georgia for the carriage of the household goods and personal effects of personnel of the United States when the contract is the contract of the United States and the United States assumes the sole responsibility of paying the carrier for the carriage by the terms of the contract.

The term "personnel of the United States" refers to employees of the United States Department of Public Health,[32] which is of course a non-defense agency.

The limitation of the allegations of the complaint to the above issue has largely, if not completely, debilitated

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[30] Record, p. 19.

[31] Record, p. 75.

[32] Record, p. 12, 2d par.

the attacks alleged in subparagraph 1 of paragraph VI of the complaint[33] concerning the impediments such Georgia Code Sections place upon congressional power to establish post-roads,[34] to raise and support armies,[35] to provide and maintain a navy,[36] to provide for the militia,[37] to exercise exclusive legislation over real property held by cession,[38] and to make all needful rules and regulations respecting property belonging to the United States.[39] Of course, if this Court should determine that any of these constitutional powers presents a substantial question as applied to this case at this stage of the litigation, then such question would constitute a ground of "unconstitutionality" within the meaning of Section 2281, thereby independently sustaining this Court's jurisdiction on direct appeal under Section 1253.[40]

Furthermore, the attack alleged in the succeeding subparagraph 2[41] concerning the burden such Georgia Code Sections place on interstate commerce[42] has been abandoned by the Appellant due to the inadequacy of the Record.[43]

The remaining ground on which the validity of such Georgia Code Sections is challenged is alleged in sub-

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[33] Record, p. 5.

[34] U. S. Const., Art. I, Sec. 8, Cl. 7.

[35] Id., Cl. 12.

[36] Id., Cl. 13.

[37] Id., Cl. 16.

[38] Id., Cl. 17.

[39] U. S. Const., Art. IV, Sec. 3, Cl. 2.

[40] See cases cited in ftn. 29, supra.

[41] Record, p. 5, Par. VI.

[42] U. S. Const., Art. I, Sec. 8, Cl. 3.

[43] Appellant's Brief, p. 26, ftn. 10, 2d par.

paragraph 3 of paragraph VI of the complaint concerning the conflict between them and the Federal Property and Administration Services Act of 1949 and supplemental administrative regulations. The parties have resolved the preliminary question as to the statutory construction of Georgia Code Sections 68-613 and 68-614 because the Appellant has alleged and the Appellee has admitted that the Appellee asserts the authority under such Code Sections to regulate the rates which motor carriers may charge for the intrastate transportation of household goods of personnel of the United States when the transportation is arranged by the United States,[44] and, furthermore, the parties have agreed that a real controversy exists between them as to the legality of the state regulation of the transportation of such household goods.[45]

In this posture, "This case presents a sole, immediate constitutional question" as defined by *Kesler v. Department of Public Safety*[46] and, hence, the alleged conflict between state and federal legislation, predicated upon a violation of the Constitution by virtue of the Supremacy Clause, constitutes a ground of "unconstitutionality", required to be heard and determined by a three-judge district court convened under Section 2281.

Therefore, the lower court, so convened, supports the jurisdiction of this Court on direct appeal under Section 1253.

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[44] Record: complaint, p. 3, par. IV, p. 5, par. V; answer, p. 88, par. 4, p. 89, pars. 5 and 6.

[45] Record: complaint, p. 6, par. VII; answer, p. 89, par. 7.

[46] (1962), 369 U. S. 153, 158, 1st par., 7 L. ed. 2d 641, 647, 1 col. 1st par.

II

The Statutes Relied Upon by the Appellant, as Applied to the Facts in This Case, Require That the Method of Arranging Rates Be Accommodated to the Existing State Regulatory Framework.

In challenging the application of state price regulation to the federal procurement of the transportation involved in this case, the Appellant relies upon certain provisions of the Administrative Expenses Act of 1946,[47] the Career Compensation Act of 1949,[48] the Federal Property and Administrative Services Act of 1949,[49] and an Act of 1956 revising certain Armed Services Procurement provisions.[50]

Initially, we should note that none of these statutes expressly provide for the immunization of the procurement activities of the Federal Government from state rate regulation, irrespective of the fact that all of the statutes were enacted subsequent to *Penn Dairies*, but prior to *Public Utilities*. We should also recognize that the statutes were enacted in an atmosphere of government regulation of business which widely involved direct price fixing by legislative enactment by both the federal and state governments, for the purpose of stabilizing and stimulating various segments of the economy.

In its challenge, the Appellant places chief reliance upon the competitive bidding and negotiation provisions of the Federal Property and Administrative Services Act of 1949 and an Act of 1956 revising certain Armed Services Pro-

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[47] 60 Stat. 806, as amended, 5 U. S. C., Sec. 73b-1.

[48] 63 Stat. 816, as amended, 37 U. S. C., Sec. 253 (a).

[49] 63 Stat. 383, 393-397, as amended, 40 U. S. C., Sec. 481, 41 U. S. C., Secs. 251-260.

[50] 70A Stat. 127-133, 10 U. S. C., Secs. 2301-2314.

curement provisions.[31] Each Act, in substantially the same language, establishes competitive bidding as the general policy governing procurement, but permits negotiation in cases, inter alia, where the public exigency will not permit the delay incident to advertising, or where it is impracticable to secure competition, or where the bid prices are unreasonable or were not independently reached in open competition.[32] The Appellant contends that these provisions reveal a congressional intent to immunize federal procurement from state price regulation.

However, this contention has been thoroughly considered and rejected by this Court in *Penn Dairies* which involved the construction of statutory provisions substantially the same as those mentioned in the 1949 and 1956 Acts. In fact, such provisions of these later Acts were derived from the statutory provisions construed in *Penn Dairies*.[33] In

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[31] An extract of such provisions is printed in Appellant's Brief at pages 72 through 74. Reliance upon the 1956 Act is misplaced because the regional director in arranging the transportation involved in this case acted under the 1949 Act (R. p. 12, 2d par.).

[32] Compare 10 U. S. C., Sec. 2305 (c), with 41 U. S. C., Sec. 253 (b), as to competitive bidding, and compare 10 U. S. C., Sec. 2304 (a) (2) (10) (15), with 41 U. S. C., Sec. 252 (c) (2) (10) (14), as to negotiation.

[33] The procurement procedures established by an Act of 1956 revising certain Armed Services Procurement provisions and the Federal Property and Administrative Services Act of 1949 were patterned after those established by the Armed Services Procurement Act of 1947 (62 Stat. 21). As to derivation of the 1956 Act, see 70A Stat. 1, 127, and as to the derivation of the 1949 Act, see House Report No. 670, dated May 24, 1949, in the 81st Cong., 1st Sess., with pertinent provisions reproduced in U. S. Code, Cong. Ser. (81st Cong.—1st Sess.—1949) at pp. 1475, 1479, last par., 1490 (a) (c) (2), and 1498 (c) (13). In turn, the pertinent provisions of the 1947 Act were derived from Sec. 3709 of the Revised Statutes and the Appropriation Act of March 2, 1901 (31 Stat. 895), which were construed in *Penn Dairies*. See Senate Report No. 571, dated July 10, 1947, in the 80th Cong., 2d Sess., the pertinent provisions of which are reproduced in U. S. Code, Cong. Ser. (80th Cong.—2d Sess.—1948) at pp. 1048, last par., 1053, last par., Hearings before House Committee on Armed

that case, this Court disposed of the appellants' contention as to statutory construction in the following terms:[54]

> To establish such a conflict the government places its reliance on Acts of Congress requiring competitive bidding in the purchase of supplies for the Army. Section 3709 of the Revised Statutes, 41 U. S. C. A. 5, requires public advertising for all government purchases save "when immediate delivery or performance is required by the public exigency." A similar provision had appeared in § 5 of the Act of March 3, 1809, 2 Stat. 535, 536, c. 28, which required all purchases by the Treasury, War or Navy Departments to be made "by open purchase or by previously advertising for proposals respecting the same." The Appropriation Act of March 2, 1901, 31 Stats. 895, 905, c. 803, and subsequent appropriation acts, included a provision requiring public advertising for the purchase of all supplies for the use of the Army, with exceptions not now material, "except in case of emergency or where it is impracticable to secure competition" and requiring the purchase of such supplies "where the same can be purchased the cheapest, the quality and cost of transportation and the interests of the Government considered." 10 U. S. C. A., § 1201. And a provision enacted as part of the Appropriation Act of July 5, 1884, 23 Stats. 106, 109, c. 217, 10 U. S. C. A., § 1200, requires that all purchases of quartermaster's supplies be made by contract after public notice and that the award be made to "the lowest responsible bidder for the best and most suitable article, the right being reserved to reject any and all bids."

Services on H. R. 1306, 80th Cong., 1st Sess., Vol. I, p. 25. Statutes construed in *Penn Dairies* are set forth in Appendix A infra, p. 1.

[54] 318 U. S. 271, last par., 87 L. ed. 754, 1st col., last par.

It is to be noted that while these statutes direct government officials to invite competitive bidding by contractors undertaking to furnish Army supplies, and also require them to accept the lowest responsible bid if any is accepted, they do not purport to set aside local price regulations or to prohibit the states from taking punitive measures for violations of such regulations. They are wholly consistent with the continued existence of such price regulations, and with the acceptance by government officers of the regulated price where that is the lowest bid, or the omission of competitive bidding in circumstances where local price regulations render it "impracticable to secure competition." Nor are we able to discern, in the language or legislative history of these or related statutes regulating government contracts, any indication that low cost was such a controlling consideration with Congress as to justify an inference that Congress intended to displace state regulations affecting the price of articles purchased by the government. The reason for the passage of § 5 of the Act of March 3, 1809, has been said to be "to throw additional safeguards around this subject; to prevent favoritism, and to give to the United States the benefit of competition." 2 Ops. Atty. Gen. 257, 259.

We are not advised of any statute in which Congress has undertaken to set aside state laws affecting the price of goods supplied to the government in order to secure a lower price than would otherwise be obtainable. And Congress has often required the inclusion in government contracts of terms not directly related to the interests of the government as purchaser, which have the effect of increasing cost. Title III, § 2 of the Act of March 3, 1933, 47 Stats. 1489, 1520, c. 212, 41 U. S. C. A., §§ 10(a)-10(c), requires the use of American-produced goods on all public

works contracts unless the head of the department finds that the use of such materials is "impracticable" or would "unreasonably increase the cost." The Eight Hour Law of August 1, 1892, 27 Stat. 340, c. 352, as amended, 40 U. S. C. A., §§ 321-326, limits to eight hours per day the work of persons employed by contractors with the government and requires all government contracts to include provisions to that effect. The Davis-Bacon Act of March 3, 1931, 46 Stat. 1494, c. 411, as amended, 40 U. S. C. A., § 276a, requires all contracts for public buildings to contain prevailing minimum wage provisions, and the Walsh-Healy Act [June 30, 1936], 49 Stat. 2036, c. 881, 41 U. S. C. A., § 35, requires the inclusion in all government contracts in excess of $10,000 of provisions requiring the contractor's adherence to prescribed minimum wages, maximum hours, restrictions on employment of child labor and requirements for safety of working conditions.

Evidence is wanting that Congress, in authorizing competitive bidding, has been so concerned with securing the lowest possible price for articles furnished to the government that it wished to set aside all local regulations affecting price. On the contrary, Congress has regarded the field of public contracts as one over which to exercise its supervisory legislative powers in safeguarding interests which may conflict with the needs of the government viewed solely as purchaser. An inexpressed purpose of Congress to set aside statutes of the states regulating their internal affairs is not lightly to be inferred and ought not to be implied where the legislative command, read in the light of its history, remains ambiguous. Considerations which lead us not to favor repeal of statutes by implication. *United States v. Borden*, 308 U. S. 188, 198, 199, 84 L. ed. 181, 190, 191, 60 S. Ct. 182; *United States v.*

Jackson, 302 U. S. 628, 631, 82 L. ed. 488, 491, 58 S. Ct. 390; *Posadas v. National City Bank*, 296 U. S. 497, 503-505, 80 L. ed. 351, 355, 356, 56 S. Ct. 349, should be at least as persuasive when the question is one of the nullification of state power by Congressional legislation.

Hence, in the absence of some evidence of an inflexible Congressional policy requiring government contracts to be awarded on the lowest bid despite noncompliance with state regulations otherwise applicable, we cannot say that the Pennsylvania milk regulation conflicts with Congressional legislation or policy and must be set aside merely because it increases the price of milk to the government. It would be no more than speculation for us to say that Congress would consider the government's pecuniary interest as a purchaser of milk more important than the interest asserted by Pennsylvania in the stabilization of her milk supply through control of price. Courts should guard against resolving these competing considerations of policy by imputing to Congress a decision which quite clearly it has not undertaken to make. Furthermore we should be slow to strike down legislation which the state concededly had power to enact, because of its asserted burden on the federal government. For, the state is powerless to remove the ill effects of our decision, while the national government, which has the ultimate power, remains free to remove the burden.

Obviously, this construction placed upon the earlier procurement statutes sharply collides with that espoused by the Appellant for the present statutes. From its rendition, *Penn Dairies* has stood as a towering landmark in the field of federal procurement, and in its shadow the Congress has continued to enact procurement statutes preserving substantially the same language construed therein

without any immunization against state price regulation. It is a well-recognized canon of construction that where statutory provisions which have been construed by a court of last resort have been reenacted in the same, or substantially the same, language, the legislature is presumed to have been familiar with their construction, and to have adopted it as a part of the law, unless a contrary intent clearly appears or a different construction is expressly provided for. The rule also applies in the construction of a statute enacted after a similar or cognate statute has been judicially construed.[55]

In conjunction with the above extract from *Penn Dairies*, we should note that the Congress has continued in force the Buy-American Act,[56] providing for a preference in the use of American produced goods on all public works contracts, the Eight Hour Law,[57] the Davis-Bacon Act,[58] and the Walsh-Healey Act,[59] which fix salutary standards governing the employment of labor on public contracts.

We should note that a provision of the Federal Property and Administrative Services Act of 1949,[60] relied on by the Appellant, provides in part as follows:

> (a) The Administrator shall, in respect of executive agencies, and to the extent that he determines that so doing is advantageous to the Government in terms of

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[55] *United States v. Dixon* (1954), 347 U. S. 381, 384, 2d par., 98 L. ed. 785, 1. col., 2d par., 74 S. Ct. 966; *Shapiro v. United States* (1948), 335 U. S. 1, 16, 2d par., 92 L. ed. 1787, 1798, 1. col. 3d par., 68 S. Ct. 1375, reh. den. 335 U. S. 836, 93 L. ed. 388, 69 S. Ct. 9; 82 C. J. S., Statutes, Sec. 370 (b) (1), p. 848

[56] 47 Stat. 1489, 1520, 41 U. S. C. A., Secs. 10a-10d

[57] 27 Stat. 340, 40 U. S. C. A., Secs. 321-326

[58] 46 Stat. 1494, 40 U. S. C. A., Secs. 276a-c

[59] 49 Stat. 2036, 41 U. S. C. A., Secs. 35-45

[60] 63 Stat. 384, Sec. 201 (a) (4), 40 U. S. C., Sec. 481

economy, efficiency, or service, and with due regard to the program activities of the agencies concerned— . . .

(4) *with respect to transportation and other public utility services for the use of executive agencies, represent such agencies in negotiations with carriers and other public utilities and in proceedings involving carriers or other public utilities before Federal and State regulatory bodies;* Provided, That the Secretary of Defense may from time to time, and unless the President shall otherwise direct, exempt the Department of Defense from action taken or which may be taken by the Administrator under clauses (1)-(4) of this subsection whenever he determines such exemption to be in the best interests of national security. (Emphasis supplied.)

Obviously, this provision demonstrates the congressional intent not to immunize the Federal Government from state price fixing in its procurement activities, because otherwise there would be no need for the Administrator to represent executive agencies in proceedings before state regulatory bodies. We should also note that the only exemption provided by the Congress is in the case of the Department of Defense when the interests of national security are involved.

Another provision of the Federal Property and Administrative Services Act of 1949 provides that "It is the declared policy of the Congress that a fair proportion of the total purchases and contracts for supplies and services for the Government shall be placed with small business concerns."[61] A virtually identical provision is contained in the Act of 1956 revising certain Armed Services Procurement provisions.[62] These provisions demonstrate a con-

[61] 63 Stat. 393, Sec. 302 (b), 41 U. S. C., Sec. 252 (b).

[62] 70A Stat. 127, 10 U. S. C., Sec. 2301.

gressional intent to subjugate the Federal Government's interest in the lowest cost procurement of supplies and services to the higher interest in stabilizing and stimulating the national economy.

The next provisions of the 1949 Act[63] we should consider provide as follows:

> (g) The Administrator, in formulating policies with respect to the disposal of surplus agricultural commodities, surplus foods processed from agricultural commodities, and surplus cotton or woolen goods, shall consult with the Secretary of Agriculture. Such policies shall be so formulated as to prevent surplus agricultural commodities, or surplus food processed from agricultural commodities, from being dumped on the market in a disorderly manner and disrupting the market prices for agricultural commodities.
>
> (h) Whenever the Secretary of Agriculture determines such action to be required to assist him in carrying out his responsibilities with respect to price support or stabilization, the Administrator shall transfer without charge to the Department of Agriculture any surplus agricultural commodities, foods, or cotton or woolen goods to be disposed of. Receipts resulting from disposal by the Department of Agriculture under this subsection shall be deposited pursuant to any authority available to the Secretary of Agriculture, except that net proceeds of any sale of surplus property so transferred shall be credited pursuant to section 204 (b), when applicable. Surplus farm commodities so transferred shall not be sold, other than for export, in quantities in excess of, or at prices less than, those applicable with respect to sales of such commodities by the Commodity Credit Corporation.

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[63] 63 Stat. 377 at p. 386, Sec. 203 (g) (h), 40 U. S. C. A. Sec. 484 (g) (h).

Again we find a clear indication of congressional intent that price support regulation shall not be disrupted by the disposal of surplus agricultural commodities.

Also, we should consider the following provision of the 1949 Act,[84] which provides as follows:

> "(d) Nothing in this Act shall impair or affect any authority of— . . .
>
> (2) any executive agency with respect to any phase (including, but not limited to, procurement, storage, transportation, processing, and disposal) of any program conducted for purposes of resale, price support, grants to farmers, stabilization, transfer to foreign governments or foreign aid, relief, or rehabilitation: Provided, That the agency carrying out such program shall, to the maximum extent practicable, consistent with the fulfillment of the purposes of the program and the effective and efficient conduct of its business, coordinate its operations with the requirements of this Act and the policies and regulations prescribed pursuant thereto. . . ."

This provision is significant because it unequivocally reflects the congressional intent that the 1949 Act shall not "impair or affect" any price support or stabilization program administered by any executive agency.

In an effort to thwart the obvious design of the above provisions, the Appellant places great reliance upon various administrative regulations. An examination of these regulations reveals that they are inconclusive as to the interpretation asserted by the Appellant. However, even if we assume *arguendo* the accuracy of such interpretation, we find thereupon a definite conflict between it and the congressional policy reflected by the above statutory provi-

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[84] 63 Stat. 377, at p. 401, Sec. 502 (d) (2).

sions requiring that federal procurement be accommodated to state price regulation. It is well established that administrative regulations which exceed statutory delegations of authority are invalid.[65]

The above provisions of the Federal Property and Administrative Services Act of 1949 and the other federal procurement statutes reflect a congressional policy of procurement consistent with the rationale of *Penn Dairies*. This congressional policy requiring the accommodation of federal procurement to governmental price support and stabilization regulation is predicated upon a realistic recognition of the needs of the national economy. In sharp contrast to this policy, is the myopic economic approach asserted by the Appellant and originated by federal agencies more concerned with stretching their appropriations than with preserving and expanding the national economy. The destructiveness of this approach is exemplified by the admission of the Appellant that its contentions sometimes result in "untoward social and economic consequences" and that, consequently, the district court's decision in *Paul v. United States* (No. 19, this Term), immunizing the United States from the affect of a state law fixing milk prices, has been nullified by executive action.[66] In short, the Appellant's contention as to the immunization of federal procurement from governmental price regulation and, hence, the stimulation of destructive cut-throat competition, is "penny-wise and pound foolish."

Recently, the President of the United States commented that "An efficient and dynamic transportation system is

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[65] *Manhattan General Equipment Co. v. Commissioner of Internal Revenue* (1936), 297 U. S. 129, 80 L. ed. 528; *Waite v. Macy* (1918), 246 U. S. 606, 62 L. ed. 892; *United States v. United Verde Copper Co.* (1905), 196 U. S. 207, 49 L. ed. 449; *Merrill v. Jones* (1883), 106 U. S. 466, 27 L. ed. 267.

[66] Appellant's Brief, p. 67, last par.

vital to our domestic economic growth, productivity and progress."[67] He further stated that the achievement of such a system "means that, to the extent possible, the users of transportation services should bear the full costs of the services they use, whether those services are provided privately or publicly."[68] Surely such a system cannot be achieved if the Federal Government fails to pay its fair share for the services it utilizes.

Manifestly, the Congress in enacting these procurement statutes did not intend the obtainment of unregulated rates, but the accommodation of the method of arranging rates to the existing state regulatory framework. Had its purpose been merely to insure low rates, it could easily have declared that competitive bidding and negotiation for government contracts should be unaffected by state regulation.[69] The congressional intent is conclusive against the Appellant's contentions.

III.

Analysis of Penn Dairies and Kindred Decisions Reveals That the Imposition by a State of an Indiscriminate and Incidental Burden Upon the United States Does Not Contravene Its Implied Immunity.

In *Penn Dairies*, this Court was confronted with the following facts. The State of Pennsylvania established the Pennsylvania Milk Control Commission with authority to fix minimum wholesale and retail prices for milk sold

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[67] President's Message on Transportation, dated April 4, 1962, infra, App. C, at p. iv.

[68] Id., p. viii, 2d par.

[69] See *Carson v. Roane-Anderson Co.* (1952), 342 U. S. 232, 96 L. ed. 257, 72 S. Ct. 257, holding that state sales and use taxes imposed upon contractors with the Atomic Energy Commission were prohibited by a provision of the Atomic Energy Act exempting the Commission from state taxation. It is interesting to note that this decision has been nullified by congressional action. See 67 Stat. 575, 42 U. S. C. A. Sec. 2208.

within the State wherever produced. The Federal Government established a military encampment within the State on land leased from the State and subject to its jurisdiction. The Army invited bids for a supply of milk. The Commission sent a notice to all milk dealers interested in submitting bids, including the appellant, of the minimum wholesale prices to be charged. The appellant submitted a bid at prices below the prescribed minima. The bid was accepted and the contract performed. Subsequently, the Commission issued a citation to the appellant to show cause why its application for a renewal of its license should not be denied because of its violation of the Commission's minimum price order. After a hearing, the license application was denied. In an appeal to the Court of Common Pleas, the Federal Government was granted leave to intervene, and it continued as a party in all subsequent proceedings in the case.[70] The Commission's order was sustained by the Superior Court and Supreme Court of Pennsylvania. On appeal, this Court held that the judgment be affirmed because the Commission had such authority under the police power of the State and the exercise thereof did not place an unconstitutional burden on the Federal Government or interfere with its policy of competitive bidding.[71] The federal procurement statutes and regulations construed by this Court in *Penn Dairies* are analogous to those referred to in Appendix B of Appellant's Brief.

The ratio decidendi of the majority opinion in *Penn Dairies* is tailor-made for the facts in this case as is evidenced by the following excerpt:

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[70] [illegible] 318 U. S. 266, 1 par. 87 L. ed. 752, 1 col. 20 [illegible]

[71] See also: *Rohrer v. Milk Control Board* (1936), 322 Pa. 257, 186 A. 336; *Milk Control Board v. Gosselin's Dairy* (1938), 301 Mass. 174, 16 N. E. 2d 641; *Paterson Milk & Cream Co. v. Milk Control Board* (1937), 118 N. J. L. 383, 192 A. 838.

Appellants,[72] first proposition proceeds on the assumption that local price regulations normally controlling milk dealers who carry on their business within the state, when applied to sales made to the government, so burden it or so conflict with the Constitution as to render the regulations unlawful. We may assume that Congress, in aid of its granted power to raise and support armies, Article 1, § 8, cl. 12, and with the support of the supremacy clause, Article 6, § 2, could declare state regulations like the present inapplicable to sales to the government. Cf. *Pittman v. Home Owners' Loan Corp.*, 308 U. S. 21, 33, 84 L. ed. 11, 17, 60 S. Ct. 15, 124 A. L. R. 1263; *Federal Land Bank v. Bismarck Lumber Co.*, 314 U. S. 95, 101-104, 86 L. ed. 65, 70-72, 62 S. Ct. 1; *Parker v. Brown*, No. 46, January 4, 1943 (317 U. S. 341, ante, 315, 63 S. Ct. 307), and cases cited. But there is no clause of the Constitution which purports, unaided by congressional enactment, to prohibit such regulations, and the question with which we are now concerned is whether such a prohibition is to be implied from the relationship of the two governments established by the Constitution.

We may assume also that, in the absence of congressional consent, there is an implied constitutional immunity of the national government from state taxation and from state regulation of the performance, by federal officers and agencies, of governmental functions. *Ohio v. Thomas*, 173 U. S. 276, 43 L. ed. 699, 19 S. Ct. 453; *Johnson v. Maryland*, 254 U. S. 51, 65 L. ed. 126, 41 S. Ct. 16; *Hunt v. United States*, 278 U. S. 96, 73 L. ed. 200, 49 S. Ct. 38; *Arizona v. California*, 283 U. S. 423, 75 L. ed. 1154, 51 S. Ct. 522. But those who contract to furnish supplies or render services to the government are not such agencies and do

[72] Id., 318 U. S. 268, last par., 87 L. ed. 753, 1. col., 3d par.

not perform governmental functions, *Metcalf & Eddy v. Mitchell*, 269 U. S. 514, 524, 525, 70 L. ed. 384, 392, 393, 46 S. Ct. 172; *James v. Dravo Contracting Co.*, 302 U. S. 134, 149, 82 L. ed. 155, 166, 58 S. Ct. 208, 114 A. L. R. 318; *Buckstaff Bath House Co. v. McKinley*, 308 U. S. 359, 362, 363, 84 L. ed. 322, 324, 325, 60 S. Ct. 279, and cases cited; cf. *Susquehanna Power Co. v. State Tax Commission*, 283 U. S. 291, 294, 75 L. ed. 1042, 1045, 51 S. Ct. 434; *Helvering v. Mountain Producers Corp.*, 303 U. S. 376, 385, 386, 82 L. ed. 907, 913, 914, 58 S. Ct. 623, and the mere fact that non-discriminatory taxation or regulation of the contractor imposes an increased economic burden on the government is no longer regarded as bringing the contractor within any implied immunity of the government for state taxation or regulation. *Alabama v. King & Boozer*, 314 U. S. 1, 9, 86 L. ed. 3, 6, 62 S. Ct. 43, 140 A. L. R. 615, and cases cited; *Baltimore & A. R. Co. v. Lichtenberg*, 176 Md. 383, 4 A. (2d) 734, s. c.; *United States v. Baltimore & A. R. Co.*, 308 U. S. 525, 84 L. ed. 444, 60 S. Ct. 297.

Here the state regulation imposes no prohibition on the national government or its officers. They may purchase milk from whom and at what price they will, without incurring any penalty. See the opinion below, 148 Pa. Super. Ct. 270, 271, 24 A. (2d) 717. As in the case of state taxation of the seller, the government is affected only as the state's regulation may increase the price which the government must pay for milk. By the exercise of control over the seller, the regulation imposes or may impose an increased economic burden on the government, for it may be assumed that the regulation if enforcible and enforced will increase the price of the milk purchased for consumption in Pennsylvania, unless the government is able to procure a supply from without the state, see *Baldwin v.*

G. A. F. Seelig, Inc., 294 U. S. 511, 79 L. ed. 1032, 55 S. Ct. 497, 101 A. L. R. 55. But in this burden, if Congress has not acted to forbid it, we can find no different or greater impairment of federal authority than in the tax on sales to a government contractor sustained in *Alabama v. King & Boozer*, 314 U. S. 1, 86 L. ed. 3, 62 S. Ct. 43, 140 A. L. R. 615, supra; or the state regulation of the operations of a trucking company in performing its contract with the government to transport workers employed on a Public Works Administration project, upheld in *Baltimore & A. R. Co. v. Lichtenberg*, 176 Md. 383, 4 A. (2d) 734, supra; or the local building regulations applied to a contractor engaged in constructing a post-office building for the government, sustained in *James Stewart & Co. v. Sadrakula*, 309 U. S. 94, 84 L. ed. 596, 60 S. Ct. 431, 127 A. L. R. 821.

The trend of our decisions is not to extend governmental immunity from state taxation and regulation beyond the national government itself and governmental functions performed by its officers and agents. We have recognized that the Constitution presupposes the continued existence of the states functioning in co-ordination with the national government, with authority in the states to lay taxes and to regulate their internal affairs and policy, and that state regulation like state taxation inevitably imposes some burdens on the national government of the same kind as those imposed on citizens of the United States within the state's borders. See *Metcalf & Eddy v. Mitchell*, supra (269 U. S. 523, 524, 70 L. ed. 392, 393, 46 S. Ct. 172). And we have held that those burdens, save as Congress may act to remove them, are to be regarded as the normal incidents of the operation within the same territory of a dual system of government, and that no immunity of the national government from such burdens is to

be implied from the Constitution which established the system. See *Graves v. New York*, 306 U. S. 466, 483, 487, 83 L. ed. 927, 934, 937, 59 S. Ct. 595, 120 A. L. R. 1466.

Since the Constitution has left Congress free to set aside local taxation and regulation of government contractors which burden the national government, we see no basis for implying from the Constitution alone a restriction upon such regulations which Congress has not seen fit to impose, unless the regulations are shown to be inconsistent with Congressional policy. Even in the case of agencies created or appointed to do the government's work we have been slow to infer an immunity which Congress has not granted and which Congressional policy does not require. *Reconstruction Finance Corp. v. J. G. Menihan Corp.*, 312 U. S. 81, 85 L. ed. 595, 61 S. Ct. 485, and cases cited; *Colorado Nat. Bank v. Bedford*, 310 U. S. 41, 53, 84 L. ed. 1067, 1074, 60 S. Ct. 800, and cases cited; cf. *Baltimore Nat. Bank v. State Tax Commission*, 297 U. S. 209, 80 L. ed. 586, 56 S. Ct. 417. Our inquiry here, therefore, must be whether the state's regulation of this contractor in a matter of local concern conflicts with Congressional legislation or with any discernible Congressional policy.[73]

The rationale of *Penn Dairies* is analogous to that expressed by this Court in numerous other decisions. The tax decisions are particularly helpful in placing in proper perspective the economic burden complained of by the Appellant in this case.

In *Alabama v. King & Boozer*,[74] a contractor erected an army camp for the United States under a cost plus con-

[73] The Court resolved this inquiry against the United States as pointed out in Part II of the Argument, *supra*.

[74] (1941) 314 U. S. 1, 86 L. ed. 3, 62 S. Ct. 43. See also *Curry v. United States* (1941) 314 U. S. 14, 86 L. ed. 9, accord

tract and this Court upheld a state sales tax on the sale of materials which was ultimately paid by the United States. This Court held that Federal Government contractors are not immune from state taxation where the burden imposed is incidental and nondiscriminatory. The Court stated:

> So far as such a nondiscriminatory state tax upon the contractor enters into the cost of the materials to the Government, that is but a normal incident of the organization within the same territory of two independent taxing sovereignties. The asserted right of the one to be free of taxation by the other does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the Government and who have been granted no tax immunity. So far as a different view has prevailed, see *Panhandle Oil Co. v. Mississippi* and *Graves v. Texas Co.*, *supra*, we think it no longer tenable. See *Metcalf & Eddy v. Mitchell*, 269 U. S. 514, 70 L. ed. 384, 46 S. Ct. 172; *Trinityfarm Constr. Co. v. Grosjean*, 291 U. S. 466, 78 L. ed. 918, 54 S. Ct. 469; *James v. Dravo Contracting Co.*, 302 U. S. 134, 160, 82 L. ed. 155, 172, 58 S. Ct. 208, 114 A. L. R. 318; *Helvering v. Gerhardt*, 304 U. S. 405, 416, 82 L. ed. 1427, 1434, 58 S. Ct. 969; *Graves v. New York*, 306 U. S. 466, 83 L. ed. 927, 59 S. Ct. 595, 120 A. L. R. 1466.

In repudiating the majority view expressed in *Panhandle*, this Court in effect adopted the dissents of Justices Holmes, Brandeis, Stone and M Reynolds expressed therein. Justice Holmes dissented as follows:

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panion case to *King & Boozer*, which upheld a state use tax imposed on the use of roofing purchased outside the state by a contractor for the United States on a cost-plus contract and used by it in constructing an army camp within the state.

[75] Id., 314 U. S. 8, last par., 86 L. ed. to lower l. col.

The state of Mississippi in 1924 and 1926 imposed upon distributors and retail dealers of gasoline, for the privilege of engaging in the business, an excise tax of three cents and four cents respectively per gallon sold in the state. The supreme court of the state declares it to be a privilege tax but points out that whether this tax is on the privilege or on the property it is imposed before the gasoline has left the dealer's hands. The plaintiff in error, a dealer, was sued by the state for certain sums that were due under the statutes. It pleaded that the sales in respect of which the tax was demanded were sales to the United States for the use of its Coast Guard and Veterans' Hospital, that these being instrumentalities of the government it did not include the amount of the tax in the price charged, and that the statute did not and could not tax the dealer for them consistently with the Constitution of the United States. The supreme court of the state upheld the tax and pointed out the extreme consequences to which a different decision might lead.

It seems to me that the state court was right. I should say plainly right, but for the effect of certain dicta of Chief Justice Marshall which culminated in or rather were founded upon his often quoted proposition that the power to tax is the power to destroy. In those days it was not recognized as it is today that most of the distinctions of the law are distinctions of degree. If the states had any power it was assumed that they had all power, and that the necessary alternatives was to deny it altogether. But this court which so often has defeated the attempt to tax in certain ways can defeat an attempt to discriminate or otherwise go too far without wholly abolishing

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[76] *Panhandle Oil Co. v. Mississippi*, (1927), 277 U. S. 218, 222, par., 72 L. ed. 857, 850, col. 1, par. 48 S. Ct. 451, 56 A. L. R. 583.

the power to tax. The power to tax is not the power to destroy while this court sits. The power to fix rates is the power to destroy if unlimited, but this court while it endeavors to prevent confiscation does not prevent the fixing of rates. A tax is not an unconstitutional regulation in every case where an absolute prohibition of sales would be one. *New York ex rel. Hatch v. Reardon*, 204 U. S. 152, 162, 51 L. ed. 415, 423, 27 Sup. Ct. Rep. 188.

To come down more closely to the question before us, when the government comes into a state to purchase I do not perceive why it should be entitled to stand differently from any other purchaser. It avails itself of the machinery furnished by the state and I do not see why it should not contribute in the same proportion that every other purchaser contributes for the privileges that it uses. It has no better or other right to use them than anyone else. The cost of maintaining the state that makes the business possible is just as necessary an element in the cost of production as labor or coal. If the plaintiff in error had paid the tax and had added it to the price the government would have had nothing to say. It could take the gasoline or leave it but it could not require the seller to abate his charge even if it had been arbitrarily increased in the hope of getting more from the government than could be got from the public at large. But in fact the government has not attempted to say anything in this case, which is simply that of a dealer trying to cut down a legitimate tax on his business because certain purchasers proposed to use the goods in a certain way, although so far as the sale was concerned they were free to turn the gasoline into the ocean, use it for private purposes or sell it again. It does not appear that the government would have refused to pay a price that included the tax if de-

manded, but if the government had refused it would not have exonerated the seller. *Pierce Oil Corp. v. Hopkins*, 264 U. S. 137, 139, 68 L. ed. 593, 596, 44 Sup. Ct. Rep. 251.

An imperfect analogy with taxation that affects interstate commerce is relied upon. Even the law on that subject has been liberalized since the decision of most of the cases cited. *Sonneborn Bros. v. Curtiss* (*Sonneborn Bros. v. Keeling*), 262 U. S. 506, 67 L. ed. 1095, 43 Sup. Ct. Rep. 643. But obviously it does not follow from the invalidity of a tax directly burdening interstate commerce that a tax upon a domestic seller is bad because he may be able to shift the burden to a purchaser, even though an agency of the government, who is willing to pay the price with the tax and who has no rational ground for demanding favor. I am not aware that the President, the Members of Congress, the Judiciary or, to come nearer to the case in hand, the Coast Guard or the officials of the Veterans' Hospital, because they are instrumentalities of government and cannot function naked and unfed, hitherto have been held entitled to have their bills for food and clothing cut down so far as their butchers and tailors have been taxed on their sales; and I had not supposed that the butchers and tailors could omit from their tax returns all receipts from the large class of customers to which I have referred. The question of interference with Government, I repeat, is one of reasonableness and degree and it seems to me that the interference in this case is too remote. *Metcalf v. Mitchell*, 269 U. S. 514, 70 L. ed. 384, 46 Sup. Ct. Rep. 172.

In *Graves v. New York ex rel. O'Keefe*[77] this Court held that the imposition of a nondiscriminatory state in-

[77] (1939), 306 U. S. 466, 83 L. ed. 927, 59 S. Ct. 595, 120 A. L. R. 1466.

come tax upon the salary of an employee of a corporate instrumentality of the Federal Government does not place an unconstitutional burden on the Federal Government where the Congress has not conferred on the salaries of the employee of such instrumentality an immunity from state taxation. This Court, speaking through Justice Stone, stated as follows:[78]

> So much of the burden of a nondiscriminatory general tax upon the incomes of employees of a government, state or national, as may be passed on economically to that government, through the effect of the tax on the price level of labor or materials, is but the normal incident of the organization within the same territory of two governments, each possessing the taxing power. The burden, so far as it can be said to exist or to affect the government in any indirect or incidental way, is one which the Constitution presupposes, and hence it cannot rightly be deemed to be within an implied restriction upon the taxing power of the national and state governments which the Constitution has expressly granted to one and has confirmed to the other. The immunity is not one to be implied from the Constitution, because if allowed it would impose to an inadmissible extent a restriction on the taxing power which the Constitution has reserved to the state governments.

O'Keefe established the doctrine that the immunity of federal instrumentalities from the indirect affect of state taxation is a matter for the Congress to determine and that the judicial function is limited to the interpretation of the congressional will.

The rationale expressed in *Penn Dairies, King & Boozo* and *O'Keefe* is reflected in the following decisions: *Trinityfarm Construction Co. v. Grosjean* (1934), 291 U. S.

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[78] Id., 306 U. S. 487, 1st par., 83 L. ed. 937, 1 col., 2d par.

466, 78 L. ed. 918, 54 S. Ct. 469 (Held that no unconstitutional taxation of means or instrumentalities of Federal Government is involved in the imposition of a state excise tax on gasoline consumed by a contractor with the United States in the performance of a contract for the construction of levees); *James v. Dravo Contracting Co.* (1937), 302 U. S. 134, 160, 82 L. ed. 155, 172, 58 S. Ct. 208, 114 A. L. R. 318 (Held that an occupation tax measured by gross income is not invalid where imposed by a state upon a contractor with the United States as laying a direct burden on the Federal Government, even though the imposition of the tax may increase the cost to the Government of the work contracted to be done); *E. E. Morgan Co. v. Arkansas for use of Phillips County* (1941), 202 Ark. 404, 150 S. W. 2d 736, app. disp. (1941), 314 U. S. 571, 86 L. ed. 463, 62 S. Ct. 77, reh. den. (1941), 314 U. S. 711, 86 L. ed. 567, 62 S. Ct. 175 (Held that a foreign corporation engaged in construction of a levee in Arkansas under federal contract negotiated outside the state was not exempt from compliance with statutory requirements for doing business in the State of Arkansas); *State v. Wiles* (1921), 116 Wash. 387, 199 P. 749, 18 A. L. R. 1163 (Held that a contractor carrying mail for the United States was required to purchase state licenses for his trucks); *Wilson v. Cook* (1946), 327 U. S. 474, 90 L. ed. 793 (Upheld state severance tax imposed upon a contractor with the United States who purchases and cuts timber from federally owned land); *Rainier National Park Co. v. Hennaford* (1935), 182 Wash. 159, 45 P. 2d 617, cert. den. (1935), 296 U. S. 647, 80 L. ed. 460, 56 S. Ct. 307 (Held that a private corporation which had a contract with the United States for the operation of concessions in a national park was subject to state taxation); *Alward v. Johnson* (1931), 282 U. S. 509, 75 L. ed. 496 (Held that one having a contract to carry the mails is not immune as an agency of the Federal Government from state taxation of property used

in the performance of such contract, even though the tax is based upon the gross receipts from his contract with the government); *Reconstruction Finance Corp. v. Menihan Corp.* (1941), 312 U. S. 81, 85 L. ed. 595 (Held that in conferring upon the RFC power to sue and to be sued, and in failing to endow it with the Federal Government's immunity from liability for costs, Congress has indicated an intention to subject it to the liability of an unsuccessful litigant to costs and to the additional allowance made by courts of equity in accordance with equity practice); *Colorado National Bank of Denver v. Bedford* (1940), 310 U. S. 41, 84 L. ed. 1067 (Held that a state statute requiring a national banking corporation to collect and remit to the state the amount of a tax imposed upon the value of safe deposit box services rendered to its customers and allowing the bank a portion of the tax as compensation for the burden of collection, being a tax on customers and not upon the bank, does not impose an unconstitutional burden on a federal instrumentality); *Trotter v. Tennessee* (1933), 290 U. S. 354, 78 L. ed. 358 (Held that the exemption from taxation of compensation paid by the United States to its disabled veterans and of disability benefits under a policy of war risk insurance, conferred by federal statute, is lost when the money is converted into land and buildings); *James Stewart & Co. v. Sadrakula* (1940), 309 U. S. 94, 84 L. ed. 596 (Held that the provisions of a state labor law requiring contractors constructing buildings to board over all open steel tiers for the protection of their employees continue operative in territory over which the United States has acquired exclusive jurisdiction, and are applicable to a contractor constructing a post office therein); *Susquehanna Power Co. v. State Tax Commission of Maryland* (1931), 283 U. S. 291, 75 L. ed. 1042 (Held that lands acquired by a licensee of the FPC for the construction of a dam in a navigable river, and used as a part of its licensed power project, are not within

the immunity from state taxation enjoyed by instrumentalities of the Federal Government); *Esso Standard Oil v. Evans* (1953), 345 U. S. 495, 97 L. ed. 1174, 73 S. Ct. 800 (Held that the constitutional doctrine of implied intergovernmental immunity does not invalidate a state privilege tax on the business of storing gasoline, measured by the quantity of gasoline stored, as applied to a contractor with the United States who stores gasoline owned by the Federal Government); and *Werner Machine Company, Inc. v. Director of Taxation* (1956); 350 U. S. 492, 100 L. ed. 634, 76 S. Ct. 534 (Sustained a state "annual franchise tax on corporations measured by net worth," which was construed as including federal bonds). See also: *Railway Mail Association v. Corsi* (1945), 326 U. S. 88, 89 L. ed 2072; *Buckstaff Bath House Co. v. McKinley* (1939), 308 U. S. 358, 84 L. ed 322; *Helvering v. Mountain Producers Corp.* (1938), 303 U. S. 376, 82 L. ed. 907; *Metcalf v. Mitchell* (1926), 269 U. S. 514, 70 L. ed 384; *Commonwealth v. Closson* (1918), 229 Mass. 329, 118 N. E. 653, L. R. A. 1918C 929; *Railroad Co. v. Lichtenberg* (1939), 176 Md. 383, 4 A. 2d 734, app. dism. (1939), 308 U. S. 525, 84 L. ed. 444, 60 S. Ct. 297.

The tax decisions considered above imposed an enormous economic burden upon the United States. However, in each case the burden was upheld because its imposition was indiscriminate and incidental, and, hence, did not contravene the implied immunity of the United States.

Furthermore, we should note that these tax decisions provide powerful analogies for supporting the state rate regulation attacked in this case. In the tax cases the economic burden imposed upon the United States was directly transformed into an asset in the state treasury thereby benefiting primarily the state. However, under the facts of this case the burden imposed upon the United States, by its paying its fair share for the transportation

services it procures, acts to stimulate and stabilize the intrastate transportation system in Georgia, which redounds to the mutual benefit of both governments. Consequently, the rationale of the tax decisions should apply with even greater force in cases of this nature.

The Appellant attempts to distinguish some of these tax decisions by contending that when the tax is levied upon a private contractor doing business with the United States the "incidence of the resulting economic burden is problematical."[79] This approach is unrealistic. From an economic standpoint, it makes no difference whether the tax is imposed on the contractor or his employer, provided it is known in advance that the demand is certain. In making appraisals contractors include in the bid the estimated tax along with the cost of labor and supplies. The crucial point involved in these cases is the legal incidence of the tax, not the economic incidence.

These decisions reveal unequivocally that private contractors who merely have business or other relations with the United States are susceptible to state regulation, irrespective of the fact that an indirect, indiscriminate and incidental burden may be transmitted through them to the United States.

IV.

Analysis of *Public Utilities* and Kindred Decisions Reveals That State Action Interfering With the Exercise of a Federal Function Contravenes the Implied Immunity of the Federal Government.

In *Public Utilities*,[80] this Court held invalid, under the Supremacy Clause of the Federal Constitution, a Cali-

[79] Appellant's Brief, p. 64, last par.

[80] *Public Utilities Commission of the State of California v. United States* (1958), 355 U. S. 534, 2 L. ed. 2d 470, 78 S. Ct. 446, reh. den. 356 U. S. 925, 2 L. ed. 2d 760, 78 S. Ct. 713

fornia statute prohibiting carriers from transporting property owned by the United States at rates other than those approved by the California Public Utilities Commission on the grounds that such statute interfered with the United States in performing its function of providing for the national defense.

In order to obtain the full impact of *Public Utilities*, we will begin this analysis by reviewing the relevant aspects of the opinion and judgment of the Three-Judge District Court[81] which was affirmed by this Court.

The District Court began its opinion with the following statement:

> "To[82] git thar fustest with the mostest men" was the recipe for victory announced by General Nathan Bedford Forrest, the Confederate cavalry leader.
>
> There is as much military wisdom in that dictum today as there was a century ago. In this atomic age, speed in the movement of men and supplies is still necessary.
>
> In the instant case, the theory of the plaintiff, as expressed in its complaint, is that if Section 530 of the Public Utilities Code of California, as amended in 1955, infra, hereinafter referred to as "Sec. 530", is held to apply to shipments made by the plaintiff, "it would greatly impede the discharge by the United States of its constitutional powers and responsibilities by inevitably causing delays in such shipments when time is of the essence and in many situations would expose to the public patterns of movement and traffic which would be subject to interpretation by the in-

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[81] *United States v. Public Utilities Commission of the State of California* (D. C.—N. D. Cal.—1956), 141 F. Supp. 168.

[82] Id., 141 F. Supp. 170, r. col.

telligence agents of foreign powers and might jeopardize the security of the United States."

The District Court reported Section 530 to read as follows:

> "Every[53] common carrier * * * may transport, free or at reduced rates: (a) *Persons* for the United States, state, county, or municipal governments, or persons or property for charitable or patriotic purposes * * *. The commission may permit common carriers to transport property at reduced rates for the United States, state, county or municipal governments, *to such extent and subject to such conditions as it may consider just and reasonable*. Nothing herein shall prevent any common carrier subject to the provisions of this part from transporting property for the United States, state, county, or municipal governments, at reduced rates *no lower than rates which lawfully may be assessed and charged by any other such common carrier or by highway permit carriers* * * *" (California Stat., 1955, c. 1966). (Emphasis supplied).

The District Court questioned Section 530 in the following terms:

> May[54] a State statute *empower* a State Commission, however patriotic and well intentioned that Commission may be, to "permit common carriers to transport property at reduced rates for the United States, state, county or municipal governments, *to such extent and* SUBJECT *to such conditions as* IT *may consider just and reasonable*"? (Emphasis supplied)

and answered the question in the negative.

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[53] Id., 141 F. Supp. 174, 1 col.

[54] Id., 141 F. Supp. 171, 1 col., last par.

After giving a statement of the case and the pleadings therein, the District Court summarized the testimony.[58]

The principal witness of the United States was Brigadier General Lasher, who represented the Department of Defense.[59]

General Lasher explained the relationship between commodity and class rates as follows:

"Well," it's the law that carriers must—we will take the railroads—must be able to quote a rate to a prospective customer on any item from any point in the United States to any other point in the United States. It was apparently impossible to price each and every item of commerce. So these items of commerce were placed in about a dozen classes. However, it is quite obvious that there would be no movement of oranges from Maine to Florida, yet there is an applicable rate in these class rates.

"As commerce grew, industry spread out, it was necessary to afford industry a cost of movement more nearly geared to the requirements of that movement, so that the goods upon arrival at destination were not too costly for the consumer, and a system of commodity rates in lieu of class rates grew up.

"The commodity rate is a rate from a point of manufacture, let's say, to a point of distribution or consumption, which is based upon a volume move, based upon the facility of the manufacturer to get his goods to market, allowing him as much in the way of profit as possible and the carrier, too. So we find that commodity rates generally move commerce in the United States today. Class rates do not. As a matter

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[58] Id., 141 F. Supp. 174 1 col. last par.

[59] Id., 141 F. Supp. 175, lower ½ col.

of fact, they are popularly referred to as paper rates, rates which are on the books to satisfy the law."

General Lasher then described a war experience in Korea which illustrated the importance of logistics.[87] He concluded this description by stating that:

> "Nothing" must be placed as an impediment to the complete flexibility and flow of movement of supplies to our troops in foreign theaters, whether it's in peace or in war."

In reply to a question regarding the effect that state regulation of rates for intrastate shipments of the Federal government's material "would have on the supply lines and logistical system of the United States,"[88] the General said:

> "Now,[89] then, for us to make these arrangements at the Washington level with the various states, let us say 48 states, with 48 varieties of methods to follow, we would find ourselves in an administrative *morass* out of which we would never fight our way, *we would never win the war!* Our negotiations for these arrangements, and I don't say just rates, but our negotiations for arrangements for the movement of traffic must be flexible; they must be direct with the parties in interest, *and they must be as secure as possible*.
>
> "We haven't touched on the security yet, but security is of primary importance to us * * *. Were we to spread * * * the record of the characteristics of our freight before the public and the parties at in-

[87] Id., 141 F. Supp. 175, r. col., 3d par.

[88] Id., 141 F. Supp. 176, l. col., 2d par.

[89] Id., 141 F. Supp. 176, l. col., 3d par.

[90] Id., 141 F. Supp. 176, r. col., 1st par.

terest, we would seriously jeopardize that security, and in some cases be in violation of the law.

"There are many items which move today which are not described, some items which are willfully misdescribed in order to hide their identity, and they are moving in quantity. The only people who know what they are are about four. The carrier, whether he be a highway carrier or rail, usually doesn't know what he is carrying; but he has been told by one of his officials that that is what he will carry and the billing will be such and such and the security of that item is thereby maintained.

"Were we to have to go through a regulatory body, we would never be able to accomplish this."

The General added that state regulation of rates would tend to increase the freight bill of the Federal Government:

"Getting back to these class and commodity rates again, the procedure would be so cumbersome and so time-consuming that we would, in desperation, ship on the class-rate structure rather than wait for the procedures to be consummated and thereby increase considerably our transportation cost."

The District Court then related the testimony of another witness for the United States, Lieutenant Colonel Hall, who testified as to the complexity of having to segregate a large number of diverse items and rate each separately for shipment in intrastate commerce.[91] Colonel Hall then testified as to the security aspects of military shipments as follows:

On[92] the subject of required secrecy in certain cases Colonel Hall stated that "really over a period of time

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[91] Id., 141 F. Supp. 178, 1 col., 2d par.

[92] Id., 141 F. Supp. 179, lower 1 col.

every military shipment is in a sense a security shipment."

"I had some experience in Europe in that situation," the Lieutenant Colonel explained. "A trained intelligence worker, espionage worker, can develop an amazing amount of accurate information just through looking at the records, say, for a month's time on our very prosaic shipments . . . shoes, medical supplies and food. Actually, a month's record of shipments to an installation will indicate how many troops are there, the status of training of the troops, the status of their health and their overall motion as well as their ultimate destination."

Colonel Hall added that he did not think it would be possible to reveal the necessary data for logical and reasonable rate approval purpose in connection with many of the shipments that are secret in nature.

"If everything is to be made public, we might as well publish it in the newspapers," he declared.

Lieutenant Colonel Elanegan of the United States Army, another witness for the United States, emphasized the security aspect of military movements[93] and the unreasonable cost of class rates in comparison with commodity rates.[94]

Lieutenant Commander Bengtson of the United States Navy testified that delays caused by state regulation might be crucial for operational purposes in the Navy[95] and that such regulation would be detrimental to Navy security requirements.[96]

Colonel Chambers of the United States Air Force testified as follows:

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[93] Id., 141 F. Supp. 179, lower r. col.

[94] Id., 141 F. Supp. 180, l. col., 2d par.

[95] Id., 141 F. Supp. 180, r. col., 2d par.

[96] Id., 141 F. Supp. 181, l. col., 2d par.

"I[97] say 'definitely,'" he explained, "because we—our logistics system is based on *speed* and we can not tolerate anything that would interfere with speed. And, as I have pointed out previously, this Air Force mission is worldwide, and I think everyone recognizes the importance that Strategic Air Command has played in present world affairs."

Referring to "security type shipments" Colonel Chambers testified that "we wouldn't want to reveal the number of shipments that do develop, nor the numbers (number?) of missiles that are involved or the points of origin and destination. We would certainly not * * * want to do it, and we would conceal that in so far as possible."

Lieutenant Colonel Eastham of the United States Marine Corps testified that the classification for rate purposes of many diverse items for shipment would slow down the movement of freight,[98] increase cost and interfere with secrecy.[99]

The District Court then briefly reviewed the testimony of witnesses appearing on behalf of the Public Utilities Commission and then went into an examination of the merits of the case.

The District Court distinguished *Penn Dairies* as follows:

In[100] the first place, the State regulation imposed "no prohibition on the national government or its officers." They might "purchase milk from whom and at what price they (wished), without incurring

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[97] Id., 141 F. Supp. 181, 1 col., 5th par.

[98] Id., 141 F. Supp. 181, 1 col., 2d par.

[99] Id., 141 F. Supp. 181, 1 col., 4th par.

[100] Id., 141 F. Supp. 180, 1 col., 1st par.

any penalty." Here, however, as we have seen, there are penalties that could be imposed upon any officer of the United States who violates the provisions of the Public Utilities Act. Section 2112 provides:

> "Every person who, either individually, or acting as an officer, agent, or employee of a corporation other than a public utility, violates any provision of this part, or fails to comply with any part of any order, decision, rule, direction, demand, or requirement of the commission, or who procures, aids, or abets any public utility in such violation or non-compliance, in a case in which a penalty has not otherwise been provided for such person, is guilty of a misdemeanor, and is punishable by a fine not exceeding one thousand dollars ($1,000), or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment."

But over and beyond this, the Penn case did not involve the procurement of the engines of war. There is a constitutional difference between a milk can and a hydrogen bomb!

The District Court concluded by finding that the United States presented evidence in abundance to substantiate its contentions,[101] and held that the United States was entitled to the relief sought by it.[102]

On appeal, this Court recognized that "The seriousness of the impact of California's regulation on the action of federal procurement officials is dramatically shown by this record."[103]

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[101] Id., 141 F. Supp. 190, l. col., last par.

[102] Id., 141 F. Supp. 190, r. col., 2d par.

[103] *Public Utilities Commission v. United States* (1958), 355 U. S. 534, 544; 3d par., 2 L. ed. 2d 470, 478, l. col., 3d par., 78 S. Ct. 446.

In affirming the judgment of the District Court, this Court carefully distinguished *Penn Dairies* and kindred decisions in the following manner:

> We[194] lay to one side these cases which sustain non-discriminatory state taxes on activities of contractors and others who do business for the United States, as their impact at most is to increase the costs of the operation. See, e. g., *Esso Standard Oil Co. v. Evans*, 345 U. S. 495, 97 L. ed. 1174, 73 S. Ct. 800; *Smith v. Davis*, 323 U. S. 111, 89 L. ed. 107, 65 S. Ct. 157; *Alabama v. King & Boozer*, 314 U. S. 1, 86 L. ed. 3, 62 S. Ct. 43, 140 A. L. R. 615; *James v. Dravo Contracting Co.*, 302 U. S. 134, 82 L. ed. 155, 58 S. Ct. 208, 114 A. L. R. 318. We also need do no more than mention cases where, absent a conflicting federal regulation, a State seeks to impose safety or other requirements on a contractor who does business for the United States. See, e. g., *Baltimore & A. R. Co. v. Lichtenberg*, 176 Md. 383, 4 A. 2d 734, app. dism'd 308 U. S. 525, 84 L. ed. 444, 60 S. Ct. 297; *James Stewart & Co. v. Sadrakula*, 309 U. S. 94, 84 L. ed 596, 60 S. Ct. 431, 127 A. L. R. 821; *Penn Dairies v. Milk Control Com.*, 318 U. S. 261, 87 L. ed. 748, 63 S. Ct. 617, can likewise be put to one side. There the question, much mooted, was whether the federal policy conflicted with the state policy fixing the price of milk which the United States purchased. The Court concluded that the state regulation "imposes no prohibition on the national government or its officers." Id. 318 U. S. at 270. Here, however, the State places a prohibition on the Federal Government. Here the conflict between the federal policy of negotiated rates and the state policy of regulation of negotiated rates seems to us to be clear. The conflict is as plain as it

[194] Id., 355 U. S. 543, 2d par., 2 L. ed. 477, 1. col., last par.

was in *Arizona v. California*, 283 U. S. 423, 451, 75 L. ed. 1154, 1163, 51 S. Ct. 522, where a State sought authority over plans and specifications for a federal dam, in *Leslie Miller, Inc. v. Arkansas*, 352 U. S. 187, 1 L. ed. 2d 231, 77 S. Ct. 257, supra, where state standards regulating contractors conflicted with federal standards for those contractors, and in *Johnson v. Maryland*, 254 U. S. 51, 65 L. ed. 126, 41 S. Ct. 16, where a state sought to exact a license requirement from a federal employee driving a mail truck. The conflict seems to us to be as clear as any that the Supremacy Clause, Art. 6, cl. 2, of the Constitution was designed to resolve.

These distinctions make it abundantly clear that this Court did not intend that *Public Utilities* would eclipse or devitalize the doctrine reflected by *Penn Dairies*. Furthermore, *Public Utilities* plainly did not announce any change in doctrine by this Court because the following three Michigan cases were decided on the same day as *Public Utilities*.

In *United States v. City of Detroit*,[105] this Court held that a state tax assessed against a private corporation engaged in business for profit based upon the value of realty owned by the United States and leased to the corporation under a lease permitting the corporation to deduct from the agreed rental any such taxes paid by it but reserving to the United States the right to contest the validity of such taxes, did not invade the constitutional immunity of federal property from taxation by the states or discriminate against the United States or those with whom it deals. This Court further held that the Federal Government's constitutional immunity does not shield private parties leasing federally owned realty from state taxes imposed on them merely because part or all of the financial

[105] (1958), 355 U. S. 466, 2 L. ed. 2d 424, 78 S. Ct. 474

burden of the taxes eventually falls on the Federal Government. This Court reached a similar conclusion in *United States v. Township of Muskegon*.[106] In *City of Detroit v. Murray Corporation of America*,[107] this Court held that a state tax, based in part on the value of materials and work in process actually in the possession of a subcontractor but legal title to which has passed to the United States, did not infringe the Federal Government's constitutional immunity from state taxation or discriminate against the Federal Government, its property or those with whom it does business. This Court recognized that the Federal Government will eventually feel the financial burden of at least some of such tax, but held that the imposition of an increased financial burden on the Federal Government did not by itself invalidate a state tax.

The ratio decidendi of *Public Utilities* is consistent with that expressed in *McCullough v. Maryland*,[108] *Arizona v. California*,[109] *Johnson v. Maryland*,[110] and other decisions.

In *McCullough v. Maryland*, this Court held that a state could not levy a direct tax upon a banking agency of the United States operating within the state. In *Arizona v. California*, this Court held that the United States may perform its functions such as building a dam to improve navigation without obtaining approval of its plans and specifications as required by state statute. In *Johnson v. Maryland*, this Court held that a state law r[illegible]ir-

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[106] (1958), 355 U. S. 484, 2 L. ed. 2d 436, 78 S. Ct. 483

[107] (1958), 355 U. S. 489, 2 L. ed. 2d 441, 460, 78 S. Ct. 458, 486.

[108] (1819), 4 Wheaton (U. S.) 316, 4 L. ed. 579

[109] (1931), 283 U. S. 423, 75 L. ed. 1154, 51 S. Ct. 522

[110] (1920), 254 U. S. 51, 65 L. ed. 126, 41 S. Ct. 16

ing the operator of a mail truck to obtain a license as a condition to his right to drive it, in effect, to perform his job, was invalid when applied to government servants. In *Leslie Miller, Inc. v. Arkansas*,[111] this Court held invalid, as applied to a federal contractor, a state law requiring contractors to obtain a license from the state. In a per curiam opinion, this Court emphasized that the case came within the rationale of *Johnson v. Maryland*. And, in *Kern-Limerick, Inc. v. Scurlock*,[112] this Court invalidated the application of a state sales tax to a sale in which federal contractors, acting as purchasing agents for the United States, acquired two tractors for use in constructing a naval ammunition depot for the United States under a "cost-plus" contract. The bids and purchase order involved in the sale stated that "This purchase is made by the Government."[113] Consequently, this Court concluded that "Under these circumstances, it is clear that the Government is the disclosed purchaser and that no liability of the purchasing agent to the seller arises from the transaction,"[114] and, on this basis, distinguished the case from *Alabama v. King & Boozer*,[115] supra. In *Mayo v. United States*,[116] this Court held that a state may not, without congressional permission, require the United States to pay an inspection fee for the inspection of fertilizer distributed to farmers by the United States as a part of its soil-building program. In *Public Utilities*, this Court struck down state regulation of the movement of military supplies because such regulation directly inter-

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[111] (1956), 352 U. S. 187, 1 L. ed. 231, 77 S. Ct. 257.

[112] (1954), 347 U. S. 110, 98 L. ed. 546, 74 S. Ct. 403.

[113] Id., 347 U. S. 119, 2d par., 98 L. ed. 555, r. col., 3d par.

[114] Id., 347 U. S. 120, last line, 98 L. ed. 556, l. col., 3d par.

[115] Id., 347 U. S. 122, 2d par., 98 L. ed. 556, r. col., last par.

[116] (1943), 319 U. S. 441, 87 L. ed. 1504.

fered with the performance of the federal function of providing for the national defense.

These decisions reflect the federal-half of the implied intergovernmental immunity doctrine which absolutely immunizes the United States, together with its functions, property and instrumentalities, from any direct burden imposed by a state. However, these decisions do not in any manner immunize, from state regulation, private contractors who merely have business or other relations with the United States, irrespective of the fact that an indirect, indiscriminate and incidental burden may be transmitted through them to the United States.

V.

The Georgia Statutes and Regulations Do Not Unconstitutionally Burden the United States or Its Officers.

In exploring this division of the Brief, we will initially consider the requirements of the rate statutes and regulations and then move on to an evaluation of the scope of the criminal statute.

A.

The Rate Statutes and Regulations Do Not Place An Unconstitutional Burden Upon the United States or Its Officers.

Within the light of the decisions previously analyzed, we turn now to a consideration of the practical effect upon the United States of Georgia's program for regulating private carriers transporting the household goods of federal employees in intrastate commerce.

In attempting to fashion an unconstitutional burden, the Appellant first complains that the Georgia tariff provision requiring that the "Property of two or more families or establishments will not be accepted for transpor-

tation as a single shipment,"[117] unduly impedes the United States' ability to procure mass movements of household goods of its employees.[118]

The tariff in no way impedes mass movements, but merely requires that the rate be computed on an intrastate single shipment basis irrespective of the number of intrastate single shipments combined in a mass movement. Under any arrangement for transporting property for hire, there must be an evaluation of the character and weight of the property to be transported in order to compute the rates therefor, whether they be established by state regulation or arrived at by negotiation or competitive bidding. Consequently, the goods of each federal employee in a mass movement must be so evaluated and, thereupon, it is as easy to apply a state tariff as it is to apply a rate obtained otherwise.

A realistic appraisal of this tariff and the practical requirements of for hire transportation reveals that Georgia's rate regulation imposes no additional administrative burden upon the United States or its officers. If any burden exists, it is economic in nature and is indiscriminately and incidentally imposed, and merely means that the United States is contributing its fair share to properly maintain the service it is using.

It is interesting to note here, that the Appellant in attempting to avoid the stigma of contributing to the economic deterioration of motor carrier transportation, tries to rationalize it away by stating that:

> Free[119] competition, it is thought, may drive prices down to the place where an inadequate return on cap-

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[117] Appellant's Brief, App. C., p. 85, last par.

[118] Appellant's Brief, pp. 44, 1st par., 61, 1st par.

[119] Appellant's Brief, p. 65, last par.

> ital investment is being realized. But once Georgia has regulated the rate to be charged all private users of the State's carrier system, *no reduction in return to any or all carriers can result from the entrance into the market of a new customer—the United States—bringing with it a surge of unregulated demand.* If the State's carriers are operating at full capacity, then to obtain transportation services the United States must offer any carrier a higher net return than that which the carrier could obtain from dealing with private shippers. If the State's carriers are operating at less than full capacity, the addition of the United States' demand for transportation provides additional revenues from the same equipment, which would not be earned if the United States had not chosen to ship within the State. (Emphasis supplied.)

This is pure fantasy. It completely ignores the cost of labor, the cost of repairs and depreciation of equipment, and other expenses arising out of furnishing transportation for the United States. It is patently fallacious to believe that once a rate of return is established for the regulated segment of a business, such return will not be adversely affected by engaging in "cut-throat" competition for the unregulated segment of the business.

Next, the Appellant complains that if it must abide by state rate regulation in intrastate commerce, it "would have one system covering shipments of household goods which cross State lines (or are within those States not seeking to regulate them), and, depending upon State legislatures, up to 50 systems governing intrastate shipments."[120] However, we should note that under the "cut-throat" competitive conditions sought by the Appellant, federal procurement officers would be continually negotiating and renegotiating rates and advertising and readver-

[120] Appellant's Brief, p. 60, last par.

tising for competitive bids on rates, which rates would be as infinite and varied as the number of carriers interested in doing business with the United States. In sharp contrast to this instability is the state regulation of intrastate commerce under which the tasks of the federal procurement officers would be greatly simplified and expedited because only a relatively small number of governmentally-fixed rate systems would have to be applied. Again, a realistic appraisal works an evaporation of the complaint.

Furthermore, even if we assume *arguendo* the existence of the regulatory burdens complained of by the Appellant, a moment's reflection reveals that the same burdens were inherent in *Penn Dairies*. This decision required federal officers to follow state price regulation and prohibited them from independently negotiating other rates for the mass purchase of milk, and further required that they procure their supplies of milk in accordance with the various applicable state laws, otherwise valid.

In *Davies Warehouse Company v. Bowles*,[121] this Court, in considering the imposition of a substantial administrative burden on a federal official under the Emergency Price Control Act, commented as follows:

> 2. It also is objected that if we consider the status of an industry under state law, the Price Administrator "would have to scrutinize and differentiate many kinds of franchises. Thus the Administrator, as incident to the task of price control, would be called upon to determine in any number of particular instances questions of state law which require the most painstaking examination of statutes and decisions." We are not prepared to deny that in some degree this will be true, for we do not hold that all warehouses, or even that all warehouses regulated in some aspects,

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[121] (1944), 321 U. S. 144, 153 (2), 88 L. ed. 635, 642, r. o. l., 2d par

come within the exemption. We think the Administrator will have to form judgments and that they will be judgments of some difficulty. Simplicity of administration is a merit that does not inhere in a federal system of government, as it is claimed to do in a unitary one. A federal system makes a merit, instead, of the very local autonomy in which complexities are inherent. Nor would the interpretation advocated by the Administrator avoid the necessity of ascertaining and considering rights thought to be possessed under local laws and not likely to be yielded readily. One effect of the Administrator's interpretation would be to postpone study of local laws from consideration in connection with wise administration to the time of litigation, as in this case. Local institutions, customs, and policies will not be overridden without fighting for consideration. The existence and force and function of established institutions of local government are always in the consciousness of lawmakers and, while their weight may vary, they may never be completely overlooked in the task of interpretation. At a time when great measures of concentration of direction are concededly necessary, it may be thought more farsighted to avoid paralyzing or extinguishing local institutions which do not seriously conflict with the central government's place. Congress has given no indication that it would draw all such state authority into the vortex of the war power. Nor should we rush the trend to centralization where Congress has not. It could never be more appropriate than now to heed the maxim reiterated recently by the Court that "the extension of federal control into these traditional local domains is a 'delicate exercise of legislative policy in achieving a wise accommodation between the needs of central control and the lively maintenance of local institutions.'" *Yonkers v. United States*, No. 109, October

Term, 1943, decided January 3, 1944 (320 U. S. 685, 690, ante, 400, 64 S. Ct. 327); *Palmer v. Massachusetts*, 308 U. S. 79, 84, 84 L. ed. 93, 97, 60 S. Ct. 34, 41 Am. Bankr. Rep. (N. S.) 134. At least in the absence of a congressional mandate to that effect, we cannot adopt a rule of construction, otherwise unjustified, to relieve federal administrators of what we may well believe is a substantial burden but one implied by the terms of the legislation when viewed against the background of our form of government.

The rationale expressed in *Penn Dairies* and *Davies* is reflected in the following decisions: *E. E. Morgan Co. v. Arkansas for use of Phillips County* (1941), 202 Ark. 404, 150 S. W. 2d 736, app. dism. (1941), 314 U. S. 571, 86 L. ed. 463, 62 S. Ct. 77, reh. den. (1941), 314 U. S. 711, 86 L. ed. 567, 62 S. Ct. 175 (Held that a foreign corporation engaged in construction of a levee in Arkansas under Federal contract negotiated outside the State was not exempt from compliance with statutory requirements for doing business in the State of Arkansas); *James Stewart & Co. v. Sadrakula* (1940), 309 U. S. 94, 84 L. ed. 596 (Held that the provisions of a state labor law requiring contractors constructing buildings to board over all open steel tiers for the protection of their employees continue operative in territory over which the United States has acquired exclusive jurisdiction, and are applicable to a contractor constructing a post office therein); *Baltimore & A. R. Co. v. Lichtenberg* (1939), 176 Md. 383, 4 A. 2d 734, app. dism. (1939), 308 U. S. 525, 84 L. ed. 444, 60 S. Ct. 297 (Held that motor carrier who contracted to carry workers for the United States was required to obtain a state permit to act as common carrier on the highways of the state); and *Commonwealth v. Closson* (1918), 229 Mass. 329, 118 N. E. 653, L. R. A. 1918C 929 (Held that United States mail carrier was compelled to obey state traffic laws even though it slowed mail delivery).

In conclusion of this aspect of the case, it seems clear that the United States in acting in accord with Georgia's program of rate regulation is completely free to procure intrastate transportation in such volumes, for such destinations, and at such times as it desires. Therefore, such rate regulation imposes no prohibition on the United States or its officers.

B.

The Criminal Statute Is Inapplicable to Federal Officers.

The Appellant further contends that the state statutes and regulations complained of are inapplicable to the United States because their violation is made a crime in certain instances. This contention is fallacious on several grounds.

The criminal provision involved is Section 68-9911 of the Code of Georgia, which provides as follows:

> 68-9911. Motor common carrier regulations, violation of.—Every officer, agent, or employee of any corporation and every person who violates or fails to comply with the provisions of Chapter 68-6 relating to the regulation of motor common carriers, or any order, rule, or regulation of the Public Service Commission, or who procures, aids, or abets therein, shall be guilty of a misdemeanor (Acts 1931, pp. 199, 208)

In the lower court, the Appellant did not attack this Code Section specifically or raise the criminal statute facet of this case. Consequently, the Georgia Public Service Commission was afforded no fair opportunity to place in evidence an affidavit to the effect that the Code Section has never been utilized in the prosecution of a shipper or an agent acting on behalf of a shipper and that it has never been interpreted as being applicable to shippers. The Courts of Georgia accord great weight to the adminis-

trative interpretation of statutes,[122] and strictly construe criminal statutes against the State.[123] Hence, the attack comes too late at this stage of the litigation.

Furthermore, Code Section 68-9911 shows on its face its inapplicability to shippers and their agents. Several cases of this Court are apposite to such interpretation.

In *United States v. Farrar*,[124] this Court held that the ordinary purchaser of intoxicating liquor fit for beverage purposes, not belonging to that class of persons who are authorized to sell, purchase or otherwise deal with such intoxicating liquor, was not subject to prosecution under Section 6 of the National Prohibition Act for purchasing liquor without a permit. This Court commented upon the justification for such a construction by stating that "Probably it was thought more important to preserve the complete freedom of the purchaser to testify against the seller than to punish him for making the purchase."[125] This Court reached a similar conclusion in *Gebardi v. United States*[126] involving the prosecution of a woman

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[122] *Mathis v. Fulton Industrial Corp.* (1929), 168 Ga. 719, 722, 1 par., 149 S. E. 35; *Carroll v. Wright* (1908), 131 Ga. 728, 730 (4), 63 S. E. 260; *Temple Baptist Church v. Georgia Terminal Co.* (1907), 128 Ga. 669, 680, 58 S. E. 157; *Epping v. City of Columbus* (1903), 117 Ga. 263 (7), 273, 43 S. E. 803; *Miller v. Wilson* (1879), 60 Ga. 505; *Solomon v. Commissioners of Cartersville* (1870), 41 Ga. 157, 161, 2d par.; *Richardson v. Maryland Casualty Co.* (1930), 41 Ga. App. 520, 525, 3d par., 153 S. E. 524; *Board of Education v. Bacon* (1918), 22 Ga. App. 72, 78, 2d par., 95 S. E. 753; *Griner v. Baggs & Perry* (1908), 4 Ga. App. 232 (3a), 235, 1st par., 61 S. E. 147.

[123] *Matthews v. Everett* (1947), 201 Ga. 730, 735, 2d par., 41 S. E. 2d 148; *Wood v. State* (1942), 68 Ga. App. 43 (2a), 21 S. E. 2d 915.

[124] (1930), 281 U. S. 624, 74 L. ed. 1078, 50 S. Ct. 425, 68 A. L. R. 892.

[125] Id., 281 U. S. 634, 2d par., 74 L. ed. 1081, upper r. col.

[126] (1932), 287 U. S. 112, 119, 1st par., 77 L. ed. 206, 209, upper r. col.

under the Mann Act. In *Nigro v. United States*,[127] the Court held on the same rationale that the evidence was insufficient to support a conviction under the Harrison Anti-Narcotic Act of a retail purchaser of narcotics for his own use. The Court achieved a similar result in *United States v. Bowles*,[128] involving a prosecution under a federal conflict of interest statute, of a person who gave compensation to a federal employee.

Georgia Code Section 68-9911 bears a sharp contrast to Sections 2107, 2110, 2111 and 2112 of the California Public Utilities Code, set forth in Appendix B[129] of this Brief. These California criminal provisions were considered in *United States v. Public Utilities Commission of the State of California*[130] and in *Public Utilities Commission of the State of California v. United States*.[131] These provisions are far more extensive than Georgia Code Section 68-9911. For instance, the penalties provided by Section 2112 were applicable to every offender whether acting individually or as an officer, agent or employee of a non-utility corporation. The breadth of such a provision would clearly include an offending shipper.[132] On the other hand, the Georgia statute obviously lacks such breadth and sophistication of coverage.

In any event, it seems clear that a state criminal statute would have no applicability to a federal officer in the performance of his official duties. There is a clear distinction between a state, on one hand, imposing an indirect burden

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[127] (C. C. A.—8th—1941), 117 F. 2d 624, 628 (1).

[128] (D. C.—D. Maine—1958), 138 F. Supp. 237, 251 (9).

[129] Infra, p. ii.

[130] (D. C.—N. D.—Cal.—1956), 141 F. Supp. 168.

[131] (1938), 355 U. S. 534, 2 L. ed. 470, 78 S. Ct. 440; reh. den. 356 U. S. 925, 2 L. ed. 2d 760, 78 S. Ct. 713.

[132] Id., 355 U. S. 538, 2d par., 2 L. ed. 2d 474, 1st col., 2d par.

on the Federal Government by regulating carriers doing business with it, and, on the other hand, interrupting the acts of the Federal Government by arresting a federal officer in the performance of his official duties, the latter of course being constitutionally prohibited.[133] Even if a state should attempt to so apply such a statute, there would be time enough to properly dispose of such an attempt.

VI.

Penn Dairies and *Public Utilities* are in Harmony and the Facts in This Case are Governed by *Penn Dairies*.

The doctrine evinced by *Penn Dairies*, *King & Boozer*, *Dravo*, *O'Keefe* and analogous decisions, demonstrate that an indiscriminate and incidental economic or administrative burden placed on the United States as a result of state regulation or taxation is not unconstitutional, provided there is no clear congressional intent shown to immunize against such a burden. The congressional immunization question is foreclosed in this case because the statutes considered herein are analogous to those construed by the Court in *Penn Dairies*. Under such circumstances, the amount of the economic burden is not a determining factor as is illustrated by the tax decisions which resulted in enormous economic burdens being placed on the United States.

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[133] *Johnson v. Maryland* (1920), 254 U. S. 51, 65 L. ed. 126, 41 S. Ct. 16 (Post office employee held immune from arrest for operating a government vehicle in carriage of mail without state driver's license); *Ohio v. Thomas* (1899), 173 U. S. 276, 283, 3d par., 43 L. ed. 699, 701, 1. col., last par., 19 S. Ct. 453 (Governor of a federal soldier's home held immune from arrest for serving oleomargarine to inmates of the home without displaying placard advertising its use as required by state law); *Cunningham v. Neagle* (1890), 135 U. S. 1, 75, 2d par., 34 L. ed. 55, 75, r. col., 2d par., 10 S. Ct. 658 (Federal marshal held immune from arrest by state officers for commission of homicide while protecting a Justice of this Court).

But such burdens are fair. Justice Holmes in his opinion in *Panhandle* explained why when he stated: "It (United States) avails itself of the machinery furnished by the state and I do not see why it should not contribute in the same proportion that every other purchaser contributes for the privileges that it uses. It has no better or other right to use them than anyone else."

Georgia's scheme of regulating motor carrier transportation is similar to that adopted by the vast majority of her sister states. The public interest sought to be served in such regulation "lies inter alia in providing safe and efficient transportation equipment; in the maintenance of adequate transportation facilities and service, regularly sustained in any specific territory or area; in providing specialized service essential for handling and delivering special types of merchandise or commodities; in the avoidance of undue and unnecessary travel and traffic congestion on the public highways; and in the maintenance of such reasonable rates and charges for the service as will give the shipper and the public using the commodity shipped the best possible economic advantage consistent with successful operation, taking into consideration in all these respects the natural advance in the quality of service in the field of transportation."[134] A significant purpose in all of such regulation is to secure adequate, sustained service

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[134] *Columbus-Cincinnati Trucking Company v. Public Utilities Commission* (1943), 141 Ohio St. 228, 47 N. E. 2d 623, 626 (6). See also: *Re Southern Pacific Motor Transport Company* (Cal. R. Com.—1928), P. U. R. 1929A, 193, 199, 24 pars.; *Seaboard Air Line Ry. Co. v. Wells* (1930), 100 Fla. 1027, 130 So. 587, 591 (3), P. U. R. 1931A, 433; *Omaha Transit Company v. Briggs* (1955), 167 Neb. 703, 94 N. W. 2d 461, 467 (2), 28 P. U. R. 3d 29; *State v. Queen City Coach Company* (1951), 233 N. C. 119, 63 S. E. 2d 113, 115 (1), 88 P. U. R. N. S. 284; *Taylor-Edwards Warehouse & Transfer Co. v. Dept. of Public Service* (1945), 22 Wash. 2d 565, 569, 157 P. 2d 309, 310 (3), 58 P. U. R. N. S. 521; *Re United Parcel Service of Seattle* (Wash. Pub. Ser. Com.—1955), 12 P. U. R. 3d 22, 27 (2); 60 C. J. S., Motor Vehicles, Sec. 44 (b), p. 187.

for the public at the *lowest reasonable cost* without unjust discrimination or *destructive competitive practices*.[135]

When the United States avails itself of an intrastate transportation system regulated by a state, the United States should pay its fair share of the cost necessary to adequately maintain such a system. The theory of state regulation of rates is to fix them at the lowest reasonable level necessary to maintain the economic stability of the industry regulated. The United States is the biggest spender in the Nation. To permit this tremendous economic force to penetrate the rate floors established by state regulation would stimulate destructive competition in a regulated industry. The effect would be a heavy economic depressant operating on a national scale. Should such a result be readily inferred from congressional legislation? The Court has answered the question in the negative on numerous occasions.

The following words of the Court, spoken through Justice Frankfurter in *Palmer v. Massachusetts*,[136] are apposite here:

> And so we have one of those problems in the reading of a statute wherein meaning is sought to be derived not from specific language but by fashioning a mosaic of significance out of the innuendoes of disjointed bits of a statute. At best this is subtle business, calling for great wariness lest what professes to be mere rendering becomes creation and attempted interpretation of legislation becomes legislation itself. Especially is wariness enjoined when the problem of construction implicates one of the recurring phases of our federalism and involves striking a balance between national and state authority in one of the most sensitive areas of government.

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[135] Id.

[136] (1939), 308 U. S. 79, 83, 2d par., 84 L. ed. 93, 97, r. col., 2d par.

> To be sure, in recent years Congress has from time to time exercised authority over purely intrastate activities of an interstate carrier when, in the judgment of Congress, an interstate carrier constituted, as a matter of economic fact, a single organism and could not effectively be regulated as to some of its interstate phases without drawing local business within the regulated sphere. But such absorption of state authority is a delicate exercise of legislative policy in achieving a wise accommodation between the needs of central control and the lively maintenance of local institutions. Therefore, in construing legislation this court has disfavored inroads by implication on state authority and resolutely confined restrictions upon the traditional power of states to regulate their local transportation to the plain mandate of Congress.

On the other hand, when the United States contracts for the services of a regulated industry and pays, as other purchasers, rates lawfully established by a state, the effect is to stimulate the national economy. The United States then contributes its fair share to the proper maintenance of the regulated industry which cannot afford to take less because of regulation. The result is consonant with the well recognized aims of federal and state governments to maintain a vibrant national economy.

The latter philosophy of government is conducive to maintaining a strong commercial transportation industry in the United States. General Lasher emphasized the military necessity for such an industry when he testified that:

> "The[137] policy of the Department of Defense is to utilize the commercial transportation industry of the United States to the fullest extent possible."

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[137] *United States v. Public Utilities Commission of State of California* (D. C.—N. D. Cal.—1956), 141 F. Supp. 168, 174, 1 col., 2d par.

> "This policy," the witness continued, "has been adopted primarily on the theory that the broader that common carrier base in the United States is, the better prepared transportationwise we will be in the case of emergency, and therefore we utilize military-owned transportation to a minimum extent and only where commercial transport cannot meet the requirements of the particular traffic involved."

Furthermore, the President of the United States has recently emphasized that "An efficient and dynamic transportation system is vital to our domestic economic growth, productivity and progress."[138]

In this case, as in *Penn Dairies*, the price regulation affects the United States only by increasing the price it pays. In *Penn Dairies* the Court recognized that the control of prices in the milk industry is clearly within the police power of the states since the public health is so directly affected. In this case, the regulation of rates in the intrastate transportation industry is also clearly within the police power of the states because the adequacy of the industry and its consequent ability to properly serve the general public is directly affected. The burden placed on the United States is only incidental to the enforcement of state milk and motor carrier regulations and the increased cost in each case is not one which was expressly made to discriminate against the United States, nor is it one which interferes with the performance of a federal function.

The Appellant attempts to distinguish this case and *Penn Dairies* on the ground that in *Penn Dairies* the army could avoid state price regulation by procuring a supply of milk from outside the state, but that such an alternative is unavailable to the Federal Government in this

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[138] President's Message on Transportation, dated April 4, 1962, infra, App. C., at p. iv.

case.[139] Such a distinction is irrelevant because obviously it was not a determining factor in the Court's disposition of *Penn Dairies*. Furthermore, the Court disregarded the obvious inquiry as to whether the Federal Government would be faced with a similar regulation of the sale of milk in other states.

In *Public Utilities*, the state had enacted legislation which directly regulated the United States, by name, when it should apply for reduced rates for the transportation of property. The state statute provided that "The (state) commission may permit common carriers to transport property at reduced rates for the United States . . . to such extent and subject to such conditions as it may consider just and reasonable." The legal effect of such a statute is to place the United States under the heel of the state when applying for reduced rates. When a state formally addresses its regulation to the United States the burdens presented are no longer indirect, indiscriminate or incidental in the constitutional sense, irrespective of how favorable such an address might be in a purely economic sense.[140] This direct interference by a state with the United States was relied on heavily in the decisions of the lower Court and this Court in *Public Utilities*.

By contrast, the Georgia statutes do not name the United States, but operate indiscriminately upon all shippers. The Georgia statutes do not interfere with the procurement of transportation by the United States, but merely impose an indiscriminate and incidental burden on it.

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[139] Appellant's Brief, p. 67, 1st par.

[140] We should note here that Georgia Code Section 68-613 (Appellant's Brief, App. A., p. 69), is sufficiently broad to permit the Georgia Public Service Commission to promulgate reduced rates for large volume shipments upon a showing of economic feasibility.

Next, we should note that in *Public Utilities* the property being transported consisted of military weapons and supplies. The District Court and this Court interpreted the state regulation as interfering seriously with the flexibility, speed and security requirements of moving military property. This is a crucial consideration during the current Cold War when espionage is being conducted in this Country by foreign powers. The opportunity for total war or limited conflict is ever present. Never in our history have the needs of immediate national defense been so synonymous with national survival. Such is the product of the thermonuclear and intercontinental ballistic missile age. Obviously, a state cannot interfere with the United States in the performance of its paramount responsibility of providing for the national defense.

By contrast, this case involves the intrastate transportation of the household goods and personal effects of civilian employees of the United States Department of Public Health. The movements here are remote from the considerations of national defense as compared with the military movements in *Public Utilities*. In this case, the national interest is more concerned with the maintenance of an economically sound commercial transportation system and its effect on the national economy and defense, than with the indiscriminate and incidental burden placed on the United States. The District Court dramatically illustrated this distinction when it opined that "There is a constitutional difference between a milk can and a hydrogen bomb!"[141]

Furthermore, *Public Utilities* involved the transportation of substantial quantities of exotic military weapons and supplies for which no commodity rates had been de-

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[141] *United States v. Public Utilities Commission of the State of California* (D. C.—N. D. Cal.—1956), 141 F. Supp. 168, 180, r. col., 2d par.

vised. Consequently, under the California regulations such military property would have to move under the higher class rates. On the other hand, the vast majority of private property moves at commodity rates because such property involves the common articles of commerce for which commodity rates have been devised. Therefore, the effect of such rate classification by California would impose a substantial economic discrimination against the United States in comparison with private shippers because of the uniqueness of much of the military property transported.

By contrast, this case involves the transportation of household goods and personal effects which are frequent items of commerce throughout the Nation. Georgia, like all the states which regulate the rates for the transportation of property, has devised commodity rates. Consequently, the economic burden imposed upon the United States is the same burden imposed upon private shippers.

The *Penn Dairies* doctrine is essential in preserving the vitality of our dual form of government, just as the *Public Utilities* doctrine is essential in prohibiting state interference with the performance of federal functions. The two doctrines coexist under our Federal Constitution. The over-expansion of either doctrine results in debilitating the desired vitality of the governmental victim.

In this case the Court is called upon to determine which doctrine rules the facts presented. The answer of the Court, while directed to a Georgia factual situation, will have nation-wide influence. Consequently, the question presented is one of degree and of balancing national interests.

On one side we have the interest of preserving and stimulating the economy of the transportation industry which is an indispensable part of the national economy and defense. On the other side, we have an indiscriminate and incidental burden imposed on the United States, as on

other shippers, who avail themselves of an intrastate transportation system. The burden is merely the cost of supporting the system.

There is no question of the importance to the Nation of an adequate and prosperous transportation system. Such a system requires that "the users of transportation services should bear the full cost of the services they use, whether those services are provided privately or publicly."[142]

The unmistakable policy of the Congress, prior decisions of the Court, and the national welfare demand that this case be governed by the *Penn Dairies* doctrine.

CONCLUSION.

The Judgment of the United States District Court for the Northern District of Georgia, sought to be reviewed in this cause, should be affirmed.

Respectfully submitted,

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September, 1962.

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[142] President's Message on Transportation, dated April 4, 1962, infra, App. C., at p. vii.

APPENDIX A.

Extract From Title 10, U. S. C. A.

1201. Advertisement for proposals; considerations governing letting of contracts. Except in cases of emergency or where it is impracticable to secure competition, or in cases otherwise provided for, the purchase of all supplies for the use of the various departments, and posts of the Army and of the branches of the Army service shall only be made after advertisement; and said supplies shall be purchased where the same can be purchased the cheapest, quality and cost of transportation and the interests of the Government considered (Mar. 2, 1901, c. 803, 31 Stat. 905. See section 218 of Title 5).

Extract from Title 41, U. S. C. A.

5. Advertisements for proposals for purchases and contracts for supplies or services for departments of Government. Except as otherwise provided by law all purchases and contracts for supplies or services in any of the departments of the Government and purchases of Indian supplies, except for personal services, shall be made by advertising a sufficient time previously for proposals respecting the same, when the public exigencies do not require the immediate delivery of the articles, or performance of the service. When immediate delivery or performance is required by the public exigency, the articles or service required may be procured by open purchase or contract, at the places and in the manner in which such articles are usually bought and sold, or such services engaged, between individuals (R. S., § 3709; June 25, 1910, c. 431, § 23, 36 Stat. 861).

APPENDIX B.

The following sections are extracted from the California Public Utilities Code:

§ 2107. Residuary penalty.—Any public utility which violates or fails to comply with any provision of the Constitution of this State or of this part, or which fails or neglects to comply with any part or provision of any order, decision, decree, rule, direction, demand or requirement of the commission, in a case in which a penalty has not otherwise been provided, is subject to a penalty of not less than five hundred dollars ($500) nor more than two thousand dollars ($2,000) for each offense (Stats. 1951, c. 764, p. 2098, § 2107).

§ 2110. Violation by officer, agent, or employee of public utility; misdemeanor; penalty.—Every officer, agent or employee of any public utility who violates or fails to comply with, or who procures, aids or abets any violation by any public utility of any provision of the Constitution of this State or of this part, or who fails to comply with any part of any order, decision, rule, direction, demand or requirement of the commission, or who procures, aids or abets any public utility in such violation or non-compliance in a case in which a penalty has not otherwise been provided for such officer, agent or employee is guilty of a misdemeanor and is punishable by a fine not exceeding one thousand dollars ($1,000), or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment (Stats. 1951, c. 764, p. 2098, § 2110).

§ 2111. Penalty for violation by corporation not a public utility.—Every corporation, other than a public utility, which violates any provision of this part, or which fails to comply with any part of any order, deci-

sion, rule, direction, demand, or requirement, of the co mission, in a case in which a penalty has not otherwise been provided for such corporation, is subject to a penalty of not less than five hundred dollars ($500) nor more than two thousand dollars ($2,000) for each offense (Stats. 1951, c. 764, p. 2099, § 2111).

§ 2112. Violation by officer, agent or employee of corporation not a public utility; misdemeanor; penalty. Every person who, either individually or acting as an officer, agent or employee of a corporation other than a public utility, vio ates any provision of this part, or fails to comply with any part of any order, decision, rule, direction, demand or requirement of the commission, or who procures, aids or abets any public utility in such violation or non-compliance, in a case in which a penalty has not otherwise been provided for such person, is guilty of a misdemeanor, and is punishable by a fine not exceeding one thousand dollars ($1,000), or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment (Stats. 1951, c. 764, p. 2099, § 2112).

APPENDIX C.

THE WHITE HOUSE.

MESSAGE ON TRANSPORTATION.

To the Congress of the United States:

An efficient and dynamic transportation system is vital to our domestic economic growth, productivity and progress. Affecting the cost of every commodity we consume or export, it is equally vital to our ability to compete abroad. It influences both the cost and the flexibility of our defense preparedness, and both the business and recreational opportunities of our citizens. This Nation has long enjoyed one of the most highly developed and diversified transportation systems in the world, and this system has helped us to achieve a highly efficient utilization of our manpower and resources.

Transportation is thus an industry which serves, and is affected with, the national interest. Federal laws and policies have expressed the national interest in transportation particularly in the last 80 years: through the promotion and development of transportation facilities, such as highways, airways, and waterways; through the regulation of rates and services; and through general governmental policies relating to taxation, procurement, labor and competition. A comprehensive program for transportation must consider all of these elements of public policy.

During the last session of Congress, action was taken to place our Federal-aid highway program on a sounder fiscal basis. Initial steps were taken to improve the operations of our regulatory agencies through reorganization. A beginning was also made toward meeting the needs of our cities for mass transportation. By Executive Order,

I recently assigned to the Department of Commerce authority for emergency transportation planning.

But pressing problems are burdening our national transportation system, jeopardizing the progress and security on which we depend. A chaotic patchwork of inconsistent and often obsolete legislation and regulation has evolved from a history of specific actions addressed to specific problems of specific industries at specific times. This patchwork does not fully reflect either the dramatic changes in technology of the past half-century or the parallel changes in the structure of competition.

The regulatory commissions are required to make thousands of detailed decisions based on out-of-date standards. The management of the various modes of transportation is subjected to excessive, cumbersome and time-consuming regulatory supervision that shackles and distorts managerial initiative. Some parts of the transportation industry are restrained unnecessarily; others are promoted or taxed unevenly and inconsistently.

Some carriers are required to provide, at a loss, services for which there is little demand. Some carriers are required to charge rates which are high in relation to cost in order to shelter competing carriers. Some carriers are prevented from making full use of their capacity by restrictions on freedom to solicit business or adjust rates. Restraints on cost-reducing rivalry in rate-making often cause competition to take the form of cost-increasing rivalry—such as excessive promotion and traffic solicitation, or excessive frequency of service. Some carriers are subject to rate regulation on the transportation of particular commodities while other carriers, competing for the same traffic, are exempt. Some carriers benefit from public facilities provided for their use, while others do not; and of those enjoying the use of public facilities, some

bear a large part of the cost, while others bear little or none.

No simple Federal solution can end the problems of any particular company or mode of transportation. On the contrary, I am convinced that less Federal regulation and subsidization is in the long run a prime prerequisite of a healthy inter-city transportation network. The constructive efforts of State and local governments as well as the transportation industry will also be needed to revitalize our transportation services.

This Administration's study of long-range transportation needs and policies convinces me that current Federal policies must be reshaped in the most fundamental and far-reaching fashion. While recognizing that a revision of the magnitude required is a task to which the Congress will wish to devote considerable time and effort, I believe the recommendations below are of sufficient urgency and importance that the Congress should begin consideration of them at the earliest practicable date. If direct and decisive action is not taken in the near future, the undesirable developments, inefficiencies, inequities, and other undesirable conditions that confront us now will cause permanent loss of essential services or require even more difficult and costly solutions in the not-too-distant future.

A Basic National Transportation Policy.

The basic objective of our nation's transportation system must be to assure the availability of the fast, safe and economical transportation services needed in a growing and changing economy to move people and goods, without waste or discrimination, in response to private and public demands at the lowest cost consistent with health, convenience, national security and other broad public objectives. Investment or capacity should be neither substantially above nor substantially below these requirements—

for chronic excess capacity involves misuse of resources, and lack of adequate capacity jeopardizes progress. The resources devoted to provision of transportation service should be used in the most effective and efficient manner possible; and this, in turn, means that users of transport facilities should be provided with incentives to use whatever form of transportation which provides them with the service they desire at the lowest total cost, both public and private.

This basic objection can and must be achieved primarily by continued reliance on unsubsidized, privately owned facilities, operating under the incentives of private profit and the checks of competition to the maximum extent practicable. The role of public policy should be to provide a consistent and comprehensive framework of equal competitive opportunity that will achieve this objective at the lowest economic and social cost to the nation.

This means a more coordinated Federal policy and a less segmented approach. It means equality of opportunity for all forms of transportation and their users and undue preference to none. It means greater reliance on the forces of competition and less reliance on the restraints of regulation. And it means that, to the extent possible, the users of transportation services should bear the full costs of the services they use, whether those services are provided privately or publicly.

For some seventy-five years, common carriage was developed by the intention of Congress and the requirements of the public as the core of our transport system. This pattern of commerce is changing—the common carrier is declining in status and stature with the consequent growth of the private and exempt carrier. To a large extent this change is attributable to the failure of Federal policies and regulation to adjust to the needs of the shipping and consuming public; to a large extent it is

attributable to the fact that the burdens of regulation are handicapping the certificated common carrier in his efforts to meet his unregulated competition. Whatever the cause, the common carrier with his obligation to serve all shippers —large or small—on certain routes at known tariffs and without any discrimination performs an essential function that should not be extinguished.

Considerable research and analysis, going far beyond our present findings, will be required before we know enough about the costs and other characteristics of various forms of transportation to guarantee the achievement of these objectives in full. In the meantime, it is clear that the following fundamental reforms in our transportation policy are needed now.

Part I. Intercity Transportation.

Our system of intercity public transportation—including railroads, trucks, buses, ships and barges, airplanes and pipelines—is seriously weakened today by artificial distortions and inefficiencies inherent in existing Federal policies. Built up over the years, they can be removed only gradually if we are to mitigate the hardships that are bound to arise in any program of far-reaching adjustment.

As an initial step, I am requesting the Chairmen of the Civil Aeronautics Board, the Interstate Commerce Commission and the Federal Maritime Commission to meet at frequent intervals to discuss regulatory problems affecting the various modes of transportation and to seek coordinated solutions in the form of legislation or administrative action that will improve the regulatory process.

(A) *Equal competitive opportunity under diminished regulation.*

(1) *Bulk Commodities*—At present, the transportation of bulk commodities by water carriers is exempt from all rate regulation under the Interstate Commerce Act, including the approval of minimum rates; but this exemption is denied to all other modes of transportation. This is clearly inequitable both to the latter and to shippers—and it is an inequity which should be removed. *Extending to all other carriers the exemption from the approval or prescription of minimum rates* would permit the forces of competition and equal opportunity to replace cumbersome regulation for these commodities, while protecting the public interest by leaving intact the ICC's control over maximum railroad rates and other safeguards (such as the prohibition against discrimination, and requirements on car service and common carrier responsibility). While this would be the preferable way to eliminate the existing inequality, Congress could elect to place all carriers on an equal footing by repealing the existing exemption—although this would result in more, instead of less, regulation and very likely in higher though more stable rates. Whichever alternative is adopted, these commodities are too important a part of carrier traffic to continue to be governed so unequally by Federal rate regulation.

(2) *Agricultural and fishery products*—An exemption similar to that described above, and now available only to motor carriers and freight forwarders, relates to agricultural and fishery products. *This exemption from minimum rates should also be extended to all carriers.* Here too, the ICC should retain control of maximum railroad rates and certain other controls to protect the public interest in those areas where there is no effective truck or water carrier competition to keep rates down.

The combined effect of extending these bulk and agricultural exemptions will be to reduce drastically and equalize fairly the regulation of freight rates in this country. Freed to exercise normal managerial initiative, carriers will be able to rationalize their operations and reduce costs; and shippers should consequently enjoy a wider choice, improved service and lower rates.

(3) *Intercity passenger rates*—The traveling public, like the commercial shipper, is also uninterested in paying higher rates to subsidize weak segments of the transportation industry. Chronic over-capacity and deficits can be ended in the long run only in an industry made fit, lean and progressive by vigorous competition and innovation. But this is not possible as long as Federal agencies fix uniform minimum rates for passenger travel. I recommend, therefore, that the Congress enact legislation which would ventually *limit the control of intercity passenger rates to the establishment of maximum rates only.* In the case of the airlines, it may be preferable to initiate this program on a gradual or temporary basis under existing authority.

To prevent the absence of minimum rate regulation under the above three proposals from resulting in predatory, discriminatory trade practices or rate wars reflecting monopolistic ambitions rather than true efficiency, the Congress should make certain that such practices by carriers freed from minimum rate regulations would be covered by existing laws against monopoly and predatory trade practices.

While the above three recommendations relate to the most critical—and controversial—problems of unnecessary or unequal regulatory curbs on transportation, other changes in the Interstate Commerce Act and the Federal Aviation Act are needed consistent with these same principles. I recommend that legislation be enacted to:

(4) Assure all carriers the right to ship vehicles or containers on the carriers of other branches of the transportation industry at the same rates available to non-carrier shippers. This change will put the various carriers in a position of equality with freight forwarders and other shippers in the use of the promising and fast growing piggy-back and related techniques.

(5) Repeal the provision of the Interstate Commerce Act which now prevents a railroad from hauling cargo it owns. The need for this provision, which goes back to the days of oppressive railroad monopoly, has largely passed; and its current effect is to handicap the railroads in competing with other modes of transportation. The anti-trust laws can insure protection against *the possible abuse by a* railroad of its dual status as shipper and carrier.

(6) Direct the regulatory agencies to sanction experimental freight rates, modifications and variations in existing systems of classification and documentation, and new kinds or combinations of service.

* * * * * * *

(C) *Even-handed Government promotion of inter-city transportation.*

To achieve a better balance of Federal promotional programs:

* * * * * * *

(3) The Federal Government is a major user of transportation services. To assure the greatest practical use of the transportation industry by government, I am directing all agencies of the Government, in meeting their own transport needs, to use authorized commercial facilities in all modes of transportation within the limits of economical and efficient operations and the requirements of military readiness.

(4) I also recommend that the Post Office Department be given greater flexibility in arranging for the transportation of mail by motor vehicle common carrier.

* * * * * * *

Conclusion.

The troubles in our transportation system are deep; and no just and comprehensive set of goals—which meets all the needs of each mode of transportation as well as shippers, consumers, taxpayers and the general public—can be quickly or easily reached. But few areas of public concern are more basic to our progress as a nation. The Congress and all citizens, as well as all Federal agencies, have an increasing interest in and an increasing responsibility to be aware of the shortcomings of existing transportation policies; and the proposals contained in this message are intended to be a constructive basis for the exercise of that responsibility.

The difficulty and the complexity of these basic troubles will not correct themselves with the mere passage of time. On the contrary, we cannot afford to delay further. Facing up to the realities of the situation, we must begin to make the painful decisions necessary to providing the transportation system required by the United States of today and tomorrow.

JOHN F. KENNEDY.

THE WHITE HOUSE.

April 5, 1962.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

UNITED STATES OF AMERICA, *Appellant*,

v.

GEORGIA PUBLIC SERVICE COMMISSION, *Appellee*

On Appeal from the United States District Court for the Northern District of Georgia

---

BRIEF ON BEHALF OF THE NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS, AMICUS CURIAE

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October 3, 1962

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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BRIEF ON BEHALF OF THE NATIONAL ASSOCIATION OF RAILROAD AND UTILITIES COMMISSIONERS, AMICUS CURIAE

PRELIMINARY STATEMENT

The National Association of Railroad and Utilities Commissioners, hereinafter referred to as "NARUC", is a voluntary organization, the membership of which embraces the members of the railroad and public utility regulatory commissions and boards of all the States

of the United States. The members of the Georgia Public Service Commission belong to the NARUC.

By the constitution of the NARUC its attorneys may be directed to appear in behalf of the NARUC, as distinguished from the individual commissions represented within its membership, in any proceeding pending before any court or commission in which it is felt that appearance on behalf of the NARUC should be made. This brief is offered for filing on behalf of the NARUC by direction of its Executive Committee in the general public interest.

On March 1, 1962, the Executive Committee of the NARUC at a regular meeting duly adopted the following resolution:

> RESOLUTION REGARDING UNITED STATES V. GEORGIA PUBLIC SERVICE COMMISSION
>
> *Whereas*, The United States District Court for the Northern District of Georgia has upheld the right of the Georgia Public Service Commission to regulate tariffs charged by carriers within the State of Georgia for the intrastate shipment of household goods of government employees under contracts made with the carriers by agencies of the federal government (*United States* v. *Georgia PSC*, Civil Action No. 7528, October 2, 1961); and
>
> *Whereas*, Appeal from this judgment is being taken by the United States to the Supreme Court of the United States; now therefore, be it
>
> *Resolved*, By the Executive Committee of the National Association of Railroad and Utilities Commissioners that the legal representatives of the Association are hereby authorized to participate as appropriate in the aforesaid cause in support of the jurisdiction of the state commission to regulate the transportation in question.

The interest of the NARUC in this proceeding is on behalf of the state commissions and boards represented in the membership of the NARUC, which agencies are charged by state laws with the duty of regulating the intrastate rates and services of the motor carriers operating within their respective states so as to assure a healthy and adequate motor transportation system operating under just, reasonable, and non-discriminatory rates within their states.

STATEMENT OF THE CASE

The Georgia Public Service Commission, in the exercise of its regulatory jurisdiction over motor carriers of property operating within the State of Georgia, approved tariffs filed with the Commission prescribing the rates to be charged for the transportation of household goods and personal effects.

The General Services Administration, upon the request of the United States Department of Public Health, Communicable Disease Center of Atlanta, Georgia, invited bids from carriers for the movement of household goods and personal effects of civilian employees of the Communicable Disease Center from Savannah, Georgia, to Atlanta, Georgia, and environs. Thirteen motor carriers submitted bids; eight quoting the just and reasonable rates as contained in the household goods tariff approved by the Georgia PSC, and five quoting rates cut below those contained in the approved tariff.

The General Services Administration awarded the contract to one of the motor carriers quoting cut rates. The Georgia PSC had a statutory duty to prevent discriminatory rates for intrastate shipments. The Commission therefore, advised the five carriers quoting cut

rates that, should they perform the transportation at rates quoted, they would be in violation of the Commission's rules and subject to having their operating authority revoked. The contracting carrier, subsequently, informed the General Services Administration that it would be unable to perform the services. The movement of the household goods was then procured by the government at the tariff rates filed and approved by the Georgia PSC.

Thereafter, the United States sued in the United States District Court for the Northern District of Georgia to prevent the Georgia PSC from regulating the tariffs charged by carriers operating within the State of Georgia for the intrastate shipment of household goods of government employees under contracts made with the carriers by government agencies. The District Court upheld the right of the Georgia PSC to regulate the tariffs under which Georgia carriers performed such transportation, and thereby its right to enforce the non-discriminatory provisions of the statute.

QUESTION PRESENTED

The question presented was lucidly spelt out by the District Court in its opinion:

> "It is also clear that short of state taxation of the national government or state regulation of the performance of federal officials and agencies of governmental functions, Ohio v. Thomas, 173 U.S. 276; Johnson v. Maryland, 254 U.S. 51; Hunt v. Washington, 278 U.S. 96; Arizona v. California, 283 U.S. 423, the states may, in the absence of Congressional enactment, adopt non-discriminatory taxing statutes, and non-discriminatory regulations, under the state's police power that may to some degree affect either the cost of

the government's operation within the state or increase difficulties touching on such operations. Alabama v. King & Boozer, 312 U.S. 1; United States v. Baltimore & Annapolis RR Co., 308 U.S. 525; Penn Dairies, Inc. et al. v. Milk Control Commission, supra (318 U.S. 261).

"The question we have here to decide, therefore, is whether the Georgia laws place a direct prohibition on the agencies of the federal government, or, if not, whether the federal laws authorizing the transportation in question impliedly prohibit inconsistent regulations."

STATEMENT OF POSITION

It is the position of the NARUC that the decision below should be affirmed.

ARGUMENT

I

Federal Procurement Practices v. National Transportation Policy

Over the last few years, there have been few subject matters which have received as much study as has the transportation system of our country. Such studies have been conducted by private groups, Congressional committees, Congressional study groups, and executive agencies among others.

Pursuant to Senate Resolutions 29, 151 and 244 of the 86th Congress, a Special Study Group on Transportation Policies in the United States prepared a report for the Senate Committee on Interstate and Foreign Commerce. This is the so-called Doyle Report, named after General John P. Doyle who was Staff Director of the Transportation Study Group. In the Committee Print, dated January 3, 1961, 87th Congress—1st Session, of this report, entitled

"National Transportation Policy", at pages 492, there is a discussion of the government as a purchaser of regulated transportation. The report reads:

> "As a purchaser of regulated transportation Government officials are, supposedly, bound by procurement regulations which apply to procurement generally and which require seeking the lowest price at which the commodity or service can be bought through competitive bidding. This fact is often stressed by Government agencies which desire to reduce their budgets at the expense of regulated carriers. Procurement regulations, however, were never designed to produce bargains for the Government but only to insure a just and reasonable price from unregulated competitors. In the presence of price regulation by a Government agency the bidding provisions of procurement regulations lose much of their meaning and should be inapplicable. The fact that much important procurement from unregulated sources has, for a variety of reasons, been exempted from bidding requirements lends support to the position that competitive bidding is certainly not necessary in addition to Government price regulation.
>
> "Furthermore, it is a stated policy of the Federal Government to promote healthy economic conditions among the regulated carriers. We must presume, in the absence of evidence to the contrary, that pricing approved by the regulatory agency is just and reasonable to carrier and user alike. If it is deemed otherwise, Government has the same recourse as any other user. In view of this fact it seems contrary to policy to provide a special avenue of price reduction to governmental agencies which is not available to nongovernmental users (who must share the burden of supporting the transportation system) and which is not subject to control by the regulatory agency.

> "Finally, in view of concepts of cost related pricing advocated elsewhere in this report, special reductions to governmental agencies not justified by cost considerations would represent an unsound deviation from an economic policy which should be equally applicable to all."

In December, 1960, the Honorable James M. Landis prepared a Report on Regulatory Agencies to the President-Elect. In a Committee Print of the report for the Senate Committee on the Judiciary, 86th Congress—2d Session, Dean Landis states, at page 25:

> ". . . Military transportation, as presently conducted, competes heavily with commercial transportation, and there are patent abuses that attach to the government as a mass shipper, but it still insists on going its own way regardless of the effects its policies may have upon other carriers."

On April 5, 1962, the President of the United States sent a message to Congress on "The Transportation System of Our Nation" (House Document No. 384, 87th Congress—2d Session). The President's message comments on the decline in the status and stature of common carrier transportation, and in its recommendations states:

> "The Federal Government is a major user of transportation services. To assure the greatest practical use of the transportation industry by Government, I am directing all agencies of the Government, in meeting their own transportation needs, to use authorized commercial facilities in all modes of transportation within the limits of economical and efficient operations and the requirements of military readiness." (p. 7)

These study reports on the Nation's transportation problems, uniformly criticise the transportation pro-

curement practices of the government as a shipper. The policies and recommendations expressed in these reports are consistent with the approach taken by the Georgia PSC in the instant case to providing at nondiscriminatory and known tariff rates transportation service for the movement of household goods.

The transportation procurement procedures manufactured by the government, ignoring all alternatives and contrary to the expressions of policy by the Executive and Legislative branches, have created an unnecessary conflict with the Georgia statutes. In such a situation, the expression of this Court in *Palmer* v. *Massachusetts*, 308 U.S. 79, 83, seems applicable:

> ". . . absorption of state authority is a delicate exercise of legislative policy in achieving a wise accommodation between the needs of central control and the lively maintenance of local institutions. Therefore, in construing legislation this court has disfavored inroads by implication on state authority and resolutely confined restrictions upon the traditional power of states to regulate their local transportation to the plain mandate of Congress."

The conflict that exists between the Georgia statutes and the government's transportation procurement procedures are of the federal government's own making. If a genuine conflict exists, it is within the federal government itself, between its procurement procedures and the policy declarations of other branches and agencies of the government. With which must the State of Georgia be consistent?

The federal government should have as great, if not greater, interest in preserving an adequate system

of transportation and the national transportation policy as should commercial shippers and the state regulatory commissions. The practice of free or reduced rates for government transportation has met with considerable dissatisfaction because of the evils and abuses which it has created. (See *supra*, and also "A Report to the President Prepared by the Presidential Advisory Committee on Transport Policy and Organization", April, 1955; "A Report to Congress by the Commission on Organization of the Executive Branch of the Government", March, 1955; "Report on Transportation Prepared for the Commission on Organization of the Executive Branch of the Government by the Subcommittee on Transportation of the Committee on Business Organization for the Department of Defense", March, 1955; Hearings on H. R. 525 before the House Committee on Interstate and Foreign Commerce—84th Congress, September 19-22, 1955; Hearings on S. 939 before the Senate Committee on Interstate and Foreign Commerce—85th Congress; and Hearings on H. R. 3233 before the House Committee on Interstate and Foreign Commerce—85th Congress.)

The House Committee on Interstate and Foreign Commerce has stated:

> "The committee is convinced that common carriers should no longer be permitted to grant rate and fare concessions to the United States, State, or municipal governments. This practice is discriminatory, wasteful, and contrary to the public interest." (House Report No. 2633 to accompany H. R. 525—84th Congress, p. 4)

These ill effects of free or reduced rates for the transportation of property for the United States must be weighed against any cost effect.

In addition, as stated in the President's Transportation Message, "Whatever the cause, the common carrier with his obligation to serve all shippers—large or small—on certain routes at known tariffs and without any discrimination performs an essential function that should not be extinguished." (*Supra*; p. 3).

II

The Decision in California PUC v. United States Is Clearly Distinguishable

The whole thrust of Appellant's argument on the merits is that this case is controlled by the decision in *Public Utilities Commission of California* v. *United States*, 355 U.S. 534 (1958). This should not be so and the two cases are clearly distinguishable.

In the *California PUC* case, it was held that a state could not prohibit carriers from transporting military traffic for the government at rates other than those approved by the state commission where the state policy of regulation of negotiated rates was in conflict with the federal policy of unregulated negotiated rates.

(1) The *California PUC* case dealt with military traffic and the requirements of national defense for the expeditious shipment of such traffic. The last paragraph of the Court's decision quoted General Lasher: "for us to make these arrangements at the Washington level with the various states, let us say 48 states, with 48 varieties of methods to follow, we would find ourselves in an administrative morass out of which we would never fight our way, we would never win the war."

The instant case relates to the Communicable Disease Center of the U. S. Department of Public Health.

There is no demonstrated relation between this agency and the needs of the military and national defense as existed in the *California PUC* case.

(2) The *California PUC* case involved transportation of military property of the United States. The instant case relates to transportation of household goods of civilian employees of the government. In the California situation the government itself needed to arrange for the transportation. In the instant situation the government has the alternative of allowing the employee to contract for the movement of his own household goods with the government remunerating the employee for his expense.

(3) In the *California PUC* case, the state policy was to require approval of the negotiated rates. This could cause delay and could give the state agency veto power over the negotiated contract.

In the instant case, the state policy does not provide for review of negotiated rates but requires non-discriminatory compliance with the filed tariff rates. The filed tariff rates are known—there is no delay. There would be no necessity for commission procedures seeking approval where the contract rates were the tariff rates.

(4) In the *California PUC* case, it would have been necessary for the military to classify thousands of different items to comply with published tariffs and classifications or else to seek "freight-all-kinds" rates in order to procure transportation.

In the instant situation, there is no need to classify items or seek new classifications, as the tariffs for household goods and personal property are already

filed and that category of transportation movement already classified.

(5) In the *California PUC* case, the challenge went to the statute which required submission to the state commission of negotiated-rate contracts.

In the instant situation, the challenge in essence goes to the state commission's rate order—to the level of rates for movement of household goods. It does not go to the procedures of the commission in approving the rates. If the government feels the level of the tariff rates are too high, it is empowered by the Administrative Services Act of 1949 (40 U.S.C. Sec. 481 (a) (4)) to represent federal agencies "in proceedings involving carriers or other public utilities before Federal and State regulatory bodies."

In short, the situation in the *California PUC* case was materially different from the instant situation, and the need and reasons for the conclusion reached in the *California PUC* case are not applicable to and should not be controlling of the instant case.

III

The District Court's Conclusion That the Instant Case Is Analogous to Penn Dairies v. Milk Control Commission Is Sound

The Georgia PSC places its chief reliance on the decision in *Penn Dairies, Inc.* v. *Milk Control Commission of Pennsylvania*, 318 U.S. 261. In the *Penn Dairies* case, it was held that a state law regulating milk prices was not, as applied to contracts for sale of milk to the Federal government, in conflict with or rendered invalid by Federal procurement statutes requiring competitive bidding. This Court stated therein:

"As in the case of state taxation of the seller, the government is affected only as the state's regulation may increase the price which the government must pay for milk. By the exercise of control over the seller, the regulation imposes or may impose an increased economic burden on the government, for it may be assumed that the regulation if enforcible and enforced will increase the price of the milk purchased for consumption in Pennsylvania, unless the government is able to procure a supply from without the state, see Baldwin v. G.A.F. Seelig, Inc., 294 US 511, 97 L ed 1032, 55 S Ct 497, 101 ALR 55. But in this burden, if Congress has not acted to forbid it, we can find no different or greater impairment of federal authority than in the tax on sales to a government contractor sustained in Alabama v. King & Boozer, 314 US 1, 86 L ed 3, 62 S Ct 43, 140 ALR 615, supra; or the state regulation of the operations of a trucking company in performing its contract with the government to transport workers employed on a Public Works Administration project, upheld in Baltimore & A.R. Co. v. Lichtenberg, 176 Md 383, 4A(2d) 734, supra; or the local building regulations applied to a contractor engaged in constructing a post-office building for the government, sustained in James Stewart & Co. v. Sadrakula, 309 US 94, 84 L ed 596, 60 Ct 431, 127 ALR 821.

"The trend of our decisions is not to extend governmental immunity from state taxation and regulation beyond the national government itself and governmental functions performed by its officers and agents. We have recognized that the Constitution presupposes the continued existence of the states functioning in co-ordination with the national government, with authority in the states to lay taxes and to regulate their internal affairs and policy, and that state regulation like state taxation inevitably imposes some burdens on

> the national government of the same kind as those imposed on citizens of the United States within the state's borders, see Metcalf & Eddy v. Mitchell, supra (269 US 523, 524, 70 L ed 392, 393, 46 S Ct 172). And we have held that those burdens, save as Congress may act to remove them, are to be regarded as the normal incidents of the operation within the same territory of a dual system of government and that no immunity of the national government from such burdens is to be implied from the Constitution which established the system, see Graves v. New York, 306 US 466, 483, 487, 83 L ed 927, 934, 937, 59 S Ct 595, 120 ALR 1466."

In *California PUC* the Court distinguished the *Penn Dairies* case in the following language:

> "There the question, much mooted, was whether the federal policy conflicted with the state policy fixing the price of milk which the United States purchased. The Court concluded that the state regulation 'imposes no prohibition on the national government or its officers.' Id. 318 U.S. at 270. Here, however, the State places a prohibition on the Federal Government. Here the conflict between the federal policy of negotiated rates and the state policy of regulation of negotiated rates seems to us to be clear."

As pointed out above, however, the instant case does not involve a state policy of regulation of negotiated rates. It involves a state policy of a fixed, known and non-discriminatory tariff rate. The instant case is not distinguishable from *Penn Dairies* by the criteria set forth in the *California PUC* case.

The instant case is much more analogous to the *Penn Dairies* situation where the state policy was one "fixing the price."

As the lower court concluded:

> "Since the shipment of household goods by the United States does not present the unique and difficult problems encountered when military supplies are involved, it appears that the case before us has more in common with Penn Dairies than with California Commission v. United States. This being so, we must conclude that Penn Dairies controls our determination of the issue here."

CONCLUSION

It is respectfully submitted that the decision below was sound and should be affirmed.

Respectfully submitted,

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October 3, 1962